



**Directorate of Distance Education  
Centre for Distance and Online Education (CDOE)  
NALSAR University of Law, Hyderabad**

**Course Material**

**M.A. (ANIMAL PROTECTION LAWS)**

**2.4.12. ANIMAL LEGAL PERSONHOOD**

(For private circulation only)



## 1. What is Legal Personhood?

### Readings:

- **A theory of legal Personhood, Visa AJ Kurki, Introduction.**  
*This chapter introduces the reader to the topic of legal personhood. It presents the central concepts, terminology, and legal doctrines pertaining to legal personhood, and explains the relevance of the notion for various contemporary legal debates.*
- **Legal Personhood: Animals, Artificial Intelligence and the unborn, Visa A.J. Kurki, Part I, Identifying The legal Person.**  
*This part address analytic-descriptive questions, such as what legal personality actually means, and normative questions, such as who or what should be recognised as a legal person. As is well-known among jurists, the law has a special conception of personhood: corporations are persons, whereas slaves have traditionally been considered property rather than persons.*
- **An Inquiry into Personhood, Mark Clark**
- **The Persons Case: The Origins and Legacy of the Fight for Legal Personhood, Robert J. Sharpe**

### Cases Laws:

- Animal Welfare Board of India v. Nagaraja (2014) 7 SCC 547
- Animal Welfare Board of India v. A. Rajendran (2000) 1 SCC 505

## 2. Legal status of animals: Property or Person?

### Readings:

- **Legal Status: Animals, Dead and Unborn Person, Ishita Jain and Banasthali Vidhiyapith**  
*The article includes the rights and the duties of the unborn child, dead person and the rights of the animals which is explained with the help of legal terminology, maxims, legal provisions and case laws. The juristic personality of different persons living, non-living or a thing is explained in the present article*

- **Living Property: A New Status for Animals Within the Legal System, *Marquette Law Review*, David Favre**

*This Article develops the proposition that non-human animals can possess and exercise legal rights. This proposal is supported by the fact that our legal system already accommodates a number of animal interests within the criminal anti-cruelty laws and civil trust laws. To make a more coherent package of all animal-related public policy issues, it is useful to acknowledge the existence of a fourth category of property, living property. This Article establishes why animals should receive consideration within the legal system, which animals should be focused upon, what some of the legal rights might be, and how the traditional rules of property law will be modified to accommodate the presence of this new category of property.*

- **Animals–Property or Persons? Gary L. Francione**

*This article helps in better understanding the concept of animal as property or person? and helps to develop and establish the claim or link, when it comes to our moral and legal obligations to nonhuman animals, this articles claim to recognize that animals have morally significant interests in not suffering and that it is morally wrong to inflict “unnecessary” suffering on animals.*

- **Personhood, Animals, and The Law, *Christine M. Korsgaard***

#### **Case Laws:**

- *Pettingall v. Pettingall*
- *New Zealand: Whanganui River Iwi v. Attorney General [2017] NZSC 101, [2017] 3 NZLR 795 (SC)*
- *Columbia: the case of an orangutan named Sandra.*
- *Brazil: Sao Paulo Monkeys Case.*

### **3. Why aren't Animals legal persons?**

#### **Readings:**

- **Animals as Sentient Beings, Legal Persons and Fellow Inhabitants of the Earth, *Melanie Davies***

*This article in short commentary, briefly discuss three areas relevant to the above trending topic, 1. the issue of nonhuman animals as sentient beings, 2. animals as legal persons.*

- **The Elephant in the Room: Detrimental effects of Animals Property status on standing in Animal Protection Cases, *Lisa Marie Morrish***

**Case Laws:**

- People for Ethical Treatment of Animals (PETA) v. Union of India, (2014) 7 SCC 547.
- Jivdaya Charitable Trust v. State of Gujrat (2018) 6 SCC 778
- Gauri Maulekhi v. Union of India, (2019) 14 SCC 717
- Animal Welfare Board of India v. A. Rajendran, (2000) 1 SCC 505

**4. Should animals be granted rights?**

**Readings:**

- **From Social Justice to Animal Liberation, *Carter Dillard & Matthew Hamity***
- **Animal Personhood: The Quest for Recognition, *Macarena Montes Franceschini***
- **Restoring Justice for Animal Victims, *Brittany Hill***

**Case Laws:**

- Kennel Club of India (KCI) v. Union of India (2013)
- N.R. Nair and Ors. v. Union of India and Ors
- People for Ethical Treatment of Animals v. Union of India (2014)

**5. Non - Human Rights Project**

**Readings:**

- **The Nonhuman Rights Project: Examining Today's Most Prominent Legal Battle for Animal Rights & The Place of Law in Activism, *Hope Holtum***

- **Raising awareness of the importance of and legal basis for nonhuman rights.**
- **"A Chimp's Day in Court: Inside the Historic Demand for Nonhuman Rights", Keim, Brandon.**

*These articles serves as an analysis of the Nonhuman Rights Project, its objectives, approaches and driving philosophies. These philosophies will be compared to other popular schools of thought in animal rights and analyzed to determine whether the Nonhuman Rights Project (NHRP) is a sustainable, effective approach in the greater quest for rights for all sentient beings.*

### **Case Laws:**

- Somerset v. Stewart
- People ex rel. Nonhuman Rights Project, Inc. v. Lavery
- Writ of Habeas Corpus, Tommy, Kiko, and Hercules and Leo
- Happy, New York Court of Appeals Case
- The NHRP and PETA's slavery lawsuit

Visa A. J. Kurki, *A Theory of Legal Personhood*, Oxford University Press, 2019, Hardcover, 224 pp, £78, Open Access, ISBN 978-0-19-884403-7.

## I. INTRODUCTION

In recent times, ‘personhood questions’ come up frequently in a variety of bioethical contexts. For example, consider the classic debates such as the status of embryo and abortion, questions surrounding the status of patients in persistent vegetative state and end-of-life decision-making,<sup>1</sup> or permissibility of the scientific experimentations on or eating of animals. Then there are the relatively newer personhood discussions around the responsibility for harms caused in Artificial Intelligence-based medical treatment, or the legal status of one’s genetic materials, or of the newly emergent entities such as organoids,<sup>2</sup> synthetic embryos,<sup>3</sup> and human–animal chimeras.<sup>4</sup> While in the normative discussions, arguments based on ‘personhood’ sometimes argue for increasing legal protections, the conceptual aspects and what exactly the granting of legal personhood in these contexts entails often remain unclear. Visa AJ Kurki’s *A Theory of Legal Personhood* aims to ‘provide a theoretical framework for understanding legal personhood in contemporary Western legal systems’,<sup>5</sup> to address these foundational questions. It largely succeeds in doing so. The many analytic nuances and thought-provoking claims in this work make it a rich playing field for bioethical minds to indulge.

As the title itself suggests, the topic of the book is ‘legal’ personhood, as compared to ‘moral’ or ‘metaphysical’ personhood.<sup>6</sup> It is divided into three parts: the first part fleshes out and questions what Kurki terms the ‘Orthodox view’, which, to put it roughly, equates legal right-holding with legal personhood. The second part contains Kurki’s own ‘bundle theory of legal personhood’ which distinguishes between ‘active’ and ‘passive’ persons. The third part departs from the mostly conceptual enterprise into an applied one, discussing the examples of the legal personhood of collectivities, artificial intelligences, and finally, animals.

1 Eg, Paul Walker and Terence Lovat, ‘Concept of Personhood and Autonomy as they Apply to End-of-Life Decisions in Intensive Care’ (2015) 18 *Medicine, Healthcare, and Philosophy* 309.

2 See eg, Julian Koplin and Julian Savulescu, ‘Moral Limits of Brain Organoid Research’ (2019) 47 *Journal of Law, Medicine, and Ethics* 760, 762.

3 See for instance, Bartha M Knoppers and Henry T Greely, ‘Biotechnologies nibbling at the legal “human”’ (2019) 366 (6472) *Science* 1455.

4 See eg, the literature including and that has followed Jason S Robert and Francois Baylis, ‘Crossing Species Boundaries’ (2013) 3(3) *American Journal of Bioethics* 1, see also Sebastian P Mann, Rosa Sun and Göran Hermerén, ‘A Framework for the Ethical Assessment of Chimeric Animal Research Involving Human Neural Tissue’ (2019) 20(10) *BMC Medical Ethics*, 1–10, <<https://doi.org/10.1186/s12910-019-0345-2>>, accessed 31 March 2022. See also Julian Savulescu, ‘Should a Human-Pig Chimera be Treated as a Person?’ *Aeon* (14 July 2016) <<https://aeon.co/ideas/should-a-human-pig-chimera-be-treated-as-a-person>> accessed 8 February 2022.

5 Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford Legal Philosophy, Open Access, OUP 2019) 31.

6 However, Kurki does not negate an overlap between these categories. For example, he says, ‘It is not a mere quirk of history that the word ‘person’ is used when referring to moral, metaphysical, as well as legal person.’ p 124.

The aim of this review is to examine two of the main ideas in Kurki's book by placing them in bioethical contexts. The first idea is the separation of legal personhood from legal right-holding, which leads to the claim that even things can hold rights, and second, his categorization of active and passive incidents of legal personhood. In order to test their strength, this review examines these ideas in contexts that go beyond the scope of his book, ranging from embryo disposition disputes, end-of-life and supported decision-making, the status of body parts and cells, induced pluripotent cells and organoids, and the creation of human–animal chimera for research.

## II. THE ORTHODOX VIEW OF LEGAL PERSONHOOD

The first part of the book deals with a view that it terms the 'Orthodox view', which, roughly put, equates legal right-holding to legal personhood.<sup>7</sup> Kurki identifies five different versions of the Orthodox view across history ranging from John Chipman Gray over Savigny to Kelsen,<sup>8</sup>

Kurki suggests that his is the first modern and wide-ranging theory that explicitly rejects the formulations of the rarely questioned equivalence of right-holding and legal personhood.<sup>9</sup> He takes us through an impressive and painstaking historical overview of personhood in the first part of the book, tracing the discussions from Roman law through the conceptions of *Rechtssubjekt* and—*fähigkeit* in the works of Savigny and 19th-century Germany and highlighting the influence of these on the English jurisprudence through the works of John Austin.

The argument is that the theorists in the area rarely question such a historically contingent understanding of legal personhood that equates personhood with the holding of rights and duties. Applying the Rawlsian method of reflective equilibrium, Kurki argues that to consider right-holding as an 'intension' of the concept does not explain the widely accepted 'extensions' of legal personhood.<sup>10</sup> For instance, under the Interest Theories of Rights, animals or embryos may be considered to be right-holders even when under legal systems they are not 'persons'. By contrast, under the Will Theory of Rights, children are not considered to be legal right-holders even though they are persons in law. While we cannot go into this debate over legal rights in detail here, suffice it to say that while one family of theories of rights grants rights to nonpersons, the other leaves out some persons from those who are right-holders. One way to solve this would be to change the conception of legal rights (as has been the debate between the two families of theories), another is to develop a more convincing account of legal personhood, and interestingly, Kurki opts for the latter option, taking us into an otherwise undertheorised territory.<sup>11</sup>

Kurki's target are arguments along the lines that 'animals cannot hold legal rights because they are not legal persons',<sup>12</sup> even if there are certain protections

7 Kurki (n 5) 5.

8 *ibid* 56.

9 *ibid* 92.

10 *ibid* 8.

11 Some of the works on legal personhood include Ngairé Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing 2009).

12 Kurki (n 5) 13.



for animals in law. This is the view of the New York State Supreme Court, Appellate Division, which in the context of legal personhood of a chimpanzee held that legal personhood bears a minimum of one right and one duty.<sup>13</sup> As compared to the animal rights cases, one of the aspects in understanding legal personhood in the context of bioethics and the legal treatment of the emerging entities is the hesitation by the courts at times to spell out the personhood status of the marginal entities. For example, one finds that for the courts, a legal strategy has been not to rule on the personhood of early-stage embryos. In *Davis v Davis*,<sup>14</sup> the first American dispute over embryo disposition when a couple separated after having frozen embryos, the Supreme Court of Tennessee diverted the 'personhood' issue while commenting that the status of embryo is somewhere between that of a person and a thing, and eventually only dealt with the question of whether there is a right of one of the parties to (not) become a genetic parent. One can explain the hesitation of the courts on the grounds that to articulate a problem in terms of personhood already attributes a certain weight to the entity, and that personhood, often seen as all-or-nothing, acts as a reason to attribute certain rights to the entity which is taken to be a person.<sup>15</sup>

### III. LEGAL NONPERSONS AND LEGAL THINGS

Kurki complements his rejection of the Orthodox view and his theory of personhood with the (purely) legal conceptual claim<sup>16</sup> that some 'legal things' or 'legal nonpersons' too can hold legal rights,<sup>17</sup> and under his account, there is no clear-cut distinction between legal persons and nonpersons.<sup>18</sup> For him, while a 'thing' is understood as an object of property rights, the category of 'nonpersons' is a distinct category.<sup>19</sup> Under Kurki's theory, without sufficient incidents, some entities, even though potentially right-holders under certain conceptions of rights and under the Hohfeldian schema, are not 'persons'. Giving the example of outlaws, Kurki highlights the category of entities that are neither things nor persons.

The idea of things or legal nonpersons holding rights may seem counterintuitive, but for bioethics, it is quite useful. Giving the example of the embryo, Kurki says that it lacks personhood *tout court* because of a lack of sufficient incidents, as is the case in *Roe v Wade* which denied fundamental legal protections to first-trimester fetuses,

13 *People ex Rel Nonhuman Rights Project, Inc v Lavery* (2014) 518336, 2014 WL 680276 (New York Appellate Division).

14 Justice Dougherty in *Junior Lewis Davis v Mary Sue Davis* 842 S.W.2d 588, [1992] (Supreme Court of Tennessee at Knoxville).

15 On how the invocation of fetal personhood is brought in questions of anti-discrimination, see Jeannie S Gersen, 'How Fetal Personhood Emerged as the Next Stage of the Abortion Wars' *The New York Times* (5 June 2019) <<https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars>>, accessed 31 March 2022.

16 As compared to, for instance, a Panpsychic claim that would derive the right-holding from any consciousness that what we regard as 'things' may be claimed to possess.

17 See also Visa AJ Kurki, 'Why Things can Hold Rights: Reconceptualising the Legal Person' in Visa AJ Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer 2017).

18 Kurki (n 5) 121.

19 For more on this thought, see Visa AJ Kurki, 'Animals, Slaves, and Corporations: Analysing Legal Thinghood' (2018) 18(1069) *German Law Journal*, 1069–1090.

counting as a denial of passive legal personhood.<sup>20</sup> Interestingly, under Kurki's theory, even prohibition of abortion may not lead to the attribution of personhood *tout court* to the foetus.

The status of early human embryos sparks heated debates, especially in light of the recent guidelines by the International Society for Stem Cell Research relaxing the 14 days' rule, which had not allowed the research on embryo older than 14 days.<sup>21</sup> Some had interpreted this prohibition as an indication of the moral status of the embryo after 14 days.<sup>22</sup> Similarly, there are also prohibitions and moratoriums, or proposed Bills<sup>23</sup> on such prohibitions and moratoriums on the creation of human-animal chimera and concerns regarding 'humanizing non-humans'.<sup>24</sup> Some have understood the justifications of these in terms of 'moral confusion' that such entities may cause.<sup>25</sup> However, one may interpret these legal provisions as counterfactuals along the lines that 'if such an entity were to be created, it would have a moral status' or that 'it would have to be legally protected'. Of course, one can explain the prohibitions themselves as Hohfeldian legal obligations to not create certain entities, with the corresponding right-holders to be other humans or the society at large. On the other hand, this could also be considered to be something along the lines of what Feinberg has called 'conditional rights', which depend on whether the entity in fact comes into existence.<sup>26</sup>

In another bioethical context, the nonsusceptibility of persons to being 'owned' raises questions about the limits of the person, especially, the ownership of the body parts.<sup>27</sup> One view is that something ceases to be a part of one's body upon severance<sup>28</sup> and is then property. There are prohibitions on the buying and selling of person's body parts, yet the courts try to protect the commercial benefits coming out of, for example, research on one's cells. Even in the *Moore* case,<sup>29</sup> for example, the California Court struggled with the question of personhood, and decided the case instead on the basis of whether full consent was obtained from Moore while still asserting that body cannot be owned.

20 Kurki (n 5) 98.

21 International Society for Stem cell Research, 'ISSCR Guidelines for Stem Cell Research and Clinical Translation' (May 2021) <[https://www.isscr.org/docs/default-source/all-isscr-guidelines/2021-guidelines/isscr-guidelines-for-stem-cell-research-and-clinical-translation-2021.pdf?sfvrsn=979d58b1\\_4](https://www.isscr.org/docs/default-source/all-isscr-guidelines/2021-guidelines/isscr-guidelines-for-stem-cell-research-and-clinical-translation-2021.pdf?sfvrsn=979d58b1_4)> accessed 8 March 2022.

22 See Sarah Chan, 'How to Rethink the Fourteen-Day Rule' (2017) 47(3) *The Hastings Center Report* 5, 5–6.

23 Eg, in the USA, the proposed Human-Animal Chimera Prohibition Act, 2016.

24 Knoppers and Greely (n 3) 40, Also Julian Koplin, 'Human-Animal Chimeras: the Moral Insignificance of Uniquely Human Capacities', (2019) *Hastings Center Report* 49, No 5, 23–32.

25 Robert and Baylis (n 4).

26 See Joel Feinberg, 'Wrongful Life and the Counterfactual Element in Harming' (1986) 4(1) *Social Philosophy and Policy* 145.

27 For the jurisprudence on the application of property principles to human body parts, See, eg, Imogen Goold, 'Why Does It Matter How We Regulate the Use of Human Body Parts?' (2014) 40(1) *Journal of Medical Ethics* 3.

28 See *R v Benthall* [2005] 18 UKHL (House of Lords) 18(1), as quoted in Muireann Quigley and Semande Ayihongbe, 'Everyday Cyborgs: On Integrated Persons and Integrated Goods' (2018) 26(2) *Medical Law Review* 276, 288.

29 *John Moore v The Regents of the University of California* (1990) 271 California Reporter No 146 (Supreme Court of California).

Human stem cells assembled into complex brain structures or organoids, with the futuristic risk of the development of consciousness raise even further challenges.<sup>30</sup> Similarly, with regards to the possibility to create ‘Synthetic Human Entities with Embryo like Features’ (SHEEFs), which are complete or incomplete embryos, uncertainties prevail as to which category they should belong to. In bioethical discussions, the case for legal protection of these entities is often made based on their moral status.<sup>31</sup> With the possibility that organoids acquire sentience, and thus potential interests, and if they are shown to have ultimate value and are protected under law, then they may be, even under Kurki’s theory, passive legal persons with claim-rights incidents. Even within the category of organoids, one may be able to differentiate between those that have either the potential for either consciousness and even sentience, and those who do not.<sup>32</sup>

One can mistakenly think that organoids can be legally protected for their own sake *only* if they are considered to have a full (or even partial) moral status. For the law to protect such entities, it is not necessary to make such a strong moral move, and Kurki’s theory can account for that. Under Kurki’s account, it would be possible to describe these protections in terms of rights held by these entities while still considering them to be legal nonpersons. The counterargument may be that these are lesser or weaker legal protections, and some may consider these not to be ‘rights’ as such, and certainly not ‘dignity rights’ that are granted to humans. However, the strength of the theory is that it creates conceptual possibilities to describe the legal protection of a range of entities with questionable moral status.

#### IV. THE BUNDLE THEORY: ACTIVE AND PASSIVE PERSONS

Under Kurki’s own ‘Bundle theory’, advanced in the second part of the book, legal personhood is not an all-or-nothing category. Under this theory, personhood is a cluster property consisting of separate but interconnected elements that the author (using Hohfeldian terminology) calls ‘incidents’.<sup>33</sup> One can understand these incidents as a complex set of disjunctions in formal logic. If, for example, the incidents are A, B, C, D, E, and F, then, under this theory,

X is a legal person if and only if

1. X is endowed with incidents A, B, C, D, and E, OR
2. X is endowed with incidents A, B, C, E, and F, OR
3. X is endowed with incidents A, B, D, E and F, OR . . .’ and so on.

30 See, eg, Sergiu P Paşca, ‘Assembling Human Brain Organoids’ (2019) 363(6423) *Science* 126, 126.

31 Eg, see Henry T Greely, in the section on ‘the rights of the surrogates’ writes “The creation of human brain surrogates could have the unexpected result of forcing us to reconsider what is “legally” a person or what is “death””, Henry T Greely, ‘Human Brain Surrogates Research: The Onrushing Ethical Dilemma’ (2021) 21(1) *The American Journal of Bioethics* 34, 41.

32 Of course, whether or not organoids have interests or suffering is a complex matter. See Koplin and Savulescu (n 2) 762 give the example of ‘sensory deprivation’ as ‘suffering’.

33 One could understand them as different ‘elements’. These closely resemble ‘rights’, but perhaps a reason Kurki does not term them as such is that theories of legal rights may not consider all of these to be rights as such.

None of these incidents alone are either necessary or sufficient conditions for being a legal person. Based on the different incidents possessed, Kurki makes a distinction between 'active' and 'passive' legal persons. While endorsing the relative independence of the legal system in conferring legal personhood as a status on certain entities,<sup>34</sup> Kurki argues against the idea that anything and everything can be conferred incidents of legal personhood.<sup>35</sup> For him, the legal person still corresponds to persons as social facts. The passive incidents of legal personhood require sentience or that the entity is of ultimate value. The 'active' incidents, on the other hand, require a certain level of agency.

The incidents of 'passive' legal personhood are divided into substantial and procedural incidents. The substantive incidents of passive personhood are (under Hohfeldian terms) 'claim rights' such as the protection of life, liberty, bodily integrity, the insusceptibility to being owned and the ownership of property reinforced by 'immunity rights', and the capacity to be beneficiary of special rights.<sup>36</sup>

Here are the incidents of 'active' and 'passive' personhood<sup>37</sup>:

| Category of Legal Persons | Procedural incidents                                                                                              | Substantive incidents                                                                                                                                                                                                   |
|---------------------------|-------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Active persons            | Legal competences (as compared to Hohfeldian powers)                                                              | Genuine legal responsibility                                                                                                                                                                                            |
| Passive persons           | Onerous legal personhood<br>The capacity to be harmed<br>Victim in criminal law<br>Passive transactional capacity | Claim rights, such as protection of life, liberty, bodily integrity reinforced by immunity rights<br>Capacity to be beneficiary of special rights<br>Insusceptibility to be bought and sold<br>Capacity to own property |

## V. ACTIVE LEGAL PERSONS AND LEGAL COMPETENCES

Kurki identifies the incidents of 'active' legal personhood as 'legal competences', and 'onerous legal personhood', the latter understood in terms of being held for 'genuine legal responsibilities'.<sup>38</sup> Legal competences, for Kurki, are defined in terms of 'acts-in-the-law', which are defined in terms of the intentional actions to

34 ibid 92. Referring to what Naffine calls the 'legalist' account in Naffine (n 11), Kurki says, 'One thing that the legalists got right . . . Whether or not x is a legal person is an institutional fact.'

35 Kurki (n 5) 92–93. Here I cannot go into Kurki's arguments against legal fictions and the status of corporations.

36 ibid 95.

37 ibid 95, 191.

38 ibid 116.

bring about changes in legal relations.<sup>39</sup> Kurki attributes Hohfeldian powers to the entities that have properties such as motivational states, and refers to Daniel Dennett's 'intentional stance'<sup>40</sup> as compared to the 'physical stance' for making distinctions about who may be regarded as an entity for active legal personhood.

Under Kurki's theory, the passive incidents are sufficient for personhood *tout court*, but the active ingredients alone are not. He argues that active incidents alone are not sufficient to grant personhood, even if they may be understood as 'rights' under some versions of the Will Theory. An example Kurki gives of beings endowed with only active incidents is slaves in ancient Rome.<sup>41</sup> This is contestable in light of, for instance, the debates around AI, where onerous legal personhood has at times been equated with legal personhood *tout court*.<sup>42</sup>

To put it simply, under Kurki's theory, while embryos may be things holding certain rights, AIs are only active persons, infants are passive persons, and full-grown human adults of sound mind are passive and active persons. Infants, while lacking the required agency for holding active legal personhood, have passive legal personhood, and a legal 'platform' administered by a human adult guardian.<sup>43</sup> Kurki's acknowledgement that not every adult human being at all times has the same incidents of personhood has implications for understanding adult guardianship, and substituted or surrogate decision-making, particularly in case of severely mentally disabled people.<sup>44</sup> Some of the debates in bioethics and medical law, for instance, around Article 12(2) of the United Nations Convention for the Rights of Persons with Disabilities 2006<sup>45</sup> seem to rest on the idea that active incidents may be necessary for personhood *tout court*.<sup>46</sup> That only (what MacCormick has called) a 'passive transactional capacity',<sup>47</sup> which is attributed to passive legal persons, is insufficient. While descriptively the distinction between active and passive personhood is helpful, it can turn problematic if one reads it as

39 Kurki's definition is as follows: 'Act A, performed by X, constitutes an act-in-the-law if and only if (1) X performs A with the intention to bring about the legal consequences r, and (2) the fact that X has performed A in order to bring about r is an element of a set of actually occurrent conditions minimally sufficient for r.' Kurki (n 5) 116.

40 Daniel Dennett, *The Intentional Stance* (7th edn, MIT Press 1998).

41 Kurki (n 5) 121.

42 See, for example, Bert-Jaap Koops, Mireille Hildebrandt and David-Olivier Jaquet-Chiffelle, 'Bridging the Accountability Gap: Rights for New Entities in the Information Society' (2010) 11(2) *Minnesota Law Review* 497, 19.

43 He invents the device of 'legal platforms' to denote a legal status, which can be administered by typically adult humans, at times on someone's behalf that may be considered to be a 'beneficiary'. Kurki distinguishes platforms from the persons in the sense that every person at least has one legal platform. See Kurki (n 5) 116, 128.

44 Some of the literature in the field of Mental Capacity, published in this journal, eg, seems to endorse what Kurki calls the 'Orthodox' view and an all-or-nothing conception. See John Coggon, 'Mental Capacity Law, Autonomy, and best Interests: An Argument for Conceptual and Practical Clarity in the Court of Protection' (2016) 24(3) *Medical Law Review* 396.

45 art 12, which deals with 'equal recognition before law'. See <<https://www.un.org/esa/socdev/enable/rights/convtexte.htm>>, accessed 31 March 2022.

46 Eg, Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10(1) *International Journal of Law in Context* 81.

47 Which is defined as the 'capacity to take the benefit or the burden created through a certain transaction'. MacCormick, as cited in Kurki (n 5) 86.

potentially hierarchical. In principlist bioethics, the importance on autonomy as the first principle<sup>48</sup> already makes the attribution of passive incidents alone insufficient for meaningful legal protections. In light of this, Kurki's distinction between independent and dependent legal competences calls for a future further discussion.

Kurki argues that his 'bundle theory' of legal personhood is not 'value free' but largely 'value neutral' with regards to the Will and the Interest theories of rights.<sup>49</sup> This means that even if we reject the normative underpinnings of passive legal personhood as personhood *tout court*, the theory still stands useful for examining a variety of contexts.

## VI. CONCLUSION

To conclude, this ambitious book is an important and witty contribution to the question of personhood in and outside of bioethics that goes beyond the traditional debates, and a starting point into the normative debates as well as further analytical clarifications. As we saw, under his theory, it becomes possible to articulate some of the complex questions that otherwise get clubbed together under a monolithic, robust, conception of personhood. In particular, his rejection of the Orthodox view has interesting implications for bioethics. To discuss the 'personhood' of an entity, particularly, stems cells or organoids, without qualifying the precise incidents, is likely to be meaningless under this account. It saves from the jump from nondestruction of embryos to nondiscrimination, and hopefully the hesitation by the Courts and law makers!

As Kurki himself puts it, 'What can my theory offer here, given its generality? The theory can offer an overall picture of legal personhood and can thus structure the legal debates focusing on more specific issues.'<sup>50</sup> In case of bioethical debates, these will likely continue. For this, the book offers new perspectives and directions.

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48 Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (4th edn, OUP 1994).

49 Kurki (n 5) 25.

50 *ibid* 192.

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# Legal Personhood: Animals, Artificial Intelligence and the Unborn

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# Legal Personhood: Animals, Artificial Intelligence and the Unborn



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# Legal Personhood: Animals, Artificial Intelligence and the Unborn

 Springer

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# Introduction

As is well known among jurists, law has a special conception of personhood: corporations are persons, whereas slaves have traditionally been considered property – ‘things’ – rather than persons. This peculiar state of affairs has not garnered the interest of legal theorists for a while; the theory of legal personhood has been a relatively marginal topic in jurisprudence for at least 50 years. However, many recent developments call for a theoretical investigation of this topic. Animal rights activists have been demanding that certain animals be recognised as legal persons in various countries. In some US states, so-called foetal personhood amendments – redefining foetuses as legal persons for some limited purposes – have been proposed and passed. Moreover, technological progress heralds brand new conundrums: Could and should autonomous artificial agents be endowed with legal personhood? How should we relate to the prospect that interspecies – including human–animal – biological mixtures could be created in the future? All this demands not only adopting appropriate regulative measures but also a serious reconsideration of the philosophical underpinnings of the legal conceptions of personhood. The contributors of this book analyse and explain these recent developments.

The first part of the book, entitled ‘Identifying the Legal Person’, is focused on putting the debates over legal personhood in context. In the first chapter, Bartosz Brożek analyses legal personality against its historical background, showing how the concept is used in different ways both in legal and moral debates. Ngairé Naffine, on the other hand, shows how ‘person’ is used in legal contexts both to denote a legal status – ‘the strictly legal person’ – and also, firstly, as the unit that underlies methodological individualism and, secondly, as the composite of a set of legal rules which make assumptions about human beings. This multifaceted nature of our debates over personhood will be present in many of the subsequent chapters. Susanna Lindroos-Hovinneimo looks at the privacy legislation of the EU and the understanding of the legal person that underlies this legislation. An analysis of legal individualism, Lindroos-Hovinneimo’s chapter ties in with Naffine’s distinctions between the ‘strictly legal person’ and the person of methodological individualism in an interesting way.

The overarching theme of Part II is the legal personality of animals. However, while addressing this topic, the authors also analyse and criticise some of the main assumptions that underpin the concept of legal personality. Tomasz Pietrzykowski examines the strict dualism embedded in our categories of person and thing. He uses nonhuman animals as an example of beings whose legal status could be changed from things to ‘non-personal subjects’ – not quite legal persons but not quite things either. He argues that such subjects should differ from traditional persons in that they are treated as the holders of a single subjective right – the right to be taken into account, i.e. to have their interests duly considered and balanced in all legal decisions that may affect them. Visa A.J. Kurki addresses the question of the correct definition of legal personhood in conjunction with the recent trials in New York concerning whether chimpanzees should be accorded limited legal personality. Kurki claims that the trials are founded on a mistaken premise: legal personhood cannot be equated with the holding of legal rights, because animals already hold rights without being legal persons. Rafał Michalczyk takes a rather different approach, looking at how practical and economic reasons could lead to software agents receiving the status of legal personality – and the rights associated with that status – before nonhuman animals.

Attempting to establish the correct definition of legal personality raises a related question: what is the relationship between being human, being a person and being a legal person? Bioethical and biojuridical questions pertaining to humanity and personhood are discussed in Part III. As an introduction, Laura Palazzani discusses the trends of ‘personism’, according to which personhood can be separated from humanity, and ‘personalism’, which claims an intrinsic connection between these concepts. Following Palazzani’s essay, Denis Franco Silva offers a critical examination of the idea that the personhood could be founded on an idea of human nature. In their chapter, Ana Paula Barbosa-Fohrmann and Gustavo Augusto Ferreira Barreto offer a somewhat contrasting view, arguing for an alternative interpretation of Kant’s conception of personality that can include those in a persistent vegetative state or with Alzheimer’s disease. In the final essay of the volume, Agnieszka Bielska-Brodziak and Aneta Gawlik analyse an instance where humanity, legal personality and personhood are in an interesting relationship. According to Polish law, a child’s sex must be determined as male or female before he or she can be issued a birth certificate, and the child remains legally unborn until the certificate is issued. This raises the question of whether the child only becomes a legal person after the certificate is issued.

For the most part, the chapters are self-sufficient and can be read independently of one another. However, we should mention a particular terminological point. Many contributors coming from civil law jurisdictions use the phrase ‘legal subject’ or ‘subject of law’ when addressing legal persons, whereas such phrases may seem odd to common lawyers. This usage dates back to Friedrich Carl von Savigny, who introduced *Rechtssubjekt* as an umbrella term to denote both natural and artificial persons, i.e. individual human beings and corporations. Apart from English, most European languages have adopted ‘legal subject’ as a synonym for ‘legal person’. However, some of the contributors maintain that these two phrases should not be



used synonymously; Pietrzykowski, for instance, argues that animals should be treated as ‘non-personal subjects’.

The essays represent both analytic and normative jurisprudence, though most of the chapters are primarily analytic in nature. However, the aim of this volume is not to argue for a single understanding of legal personhood. Rather, many of the authors’ positions stand in direct opposition to each other and rely on various theoretical and philosophical traditions. The purpose of the book is thus not to settle the relevant contemporary debates but rather to problematise the assumptions that underlie the Western legal doctrines of personhood and to suggest ways in which our theoretical categories could be built on firmer ground.

# **Part I**

## **Identifying the Legal Person**

# Chapter 1

## The Troublesome ‘Person’

Bartosz Brożek

When a bioethical discussion touches upon the notion of the person it usually takes the shape of an argument which has a decisive character, often in form of a simple syllogism: one should not kill a person; X is a person; therefore: one should not kill X with, in the place of X – according to the problem considered – terms such as “*nasciturus*”, “someone terminally ill who has requested euthanasia”, or “someone who’s life functions are maintained by medical apparatus” are employed.

On the other hand, one may also encounter such positions as that noted by Hugo Engelhardt:

Not all people are equal. [...] Not all people are persons. Not all people are conscious, understanding and able to praise or criticise something. A foetus, a new-born, the mentally handicapped, those in a deep coma – are examples of people who are *nonpersons* (Engelhardt 1996: 135–138).

One should note that Engelhardt does not question the syllogistic scheme above. He rather rejects the validity of one of its premises i.e. that a *nasciturus* or someone who is mentally handicapped is a person.

It is difficult to escape the uneasy feeling that something has gone terribly wrong here. Too much seems to hang together with the definition of a person one embraces. In what follows, I will try to show that the feeling is fully justified.

---

This paper is partially based on B. Brożek, “The Notion of the Person in Bioethical Debates”, published in (Stelmach et al. 2010). This contribution was made possible through the research grant ‘Naturalizacja prawa’ awarded by the National Science Center.

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## 1.1 From Mask to Theology

The notion of the person (Lat. *persona*) stems from the word *prosopon*. This term referred to a mask in Greek (and Roman) theatre and its application in philosophy came somewhat later since we cannot find any trace of it in Ancient philosophy (Wiles 1991). It was initially utilised in Roman law but Roman jurists did not equate the word *persona* with the word *homo*. One man could, from the legal perspective, be many persons. As it was termed: *unus homo sustinet plures personas*. It functioned thus so that *persona* identified (some) legal status of a man, independent of their other statuses (Ball 1901: 78). Romans could thus be one person as a Roman citizen, another as *pater familias*, yet other if they performed certain public offices. It is not difficult to see why the word *persona* was so appealing in this context: for the law, a man – depending on the legal context – wore different ‘masks’: as a senator, the head of the family, a praetor etc.

It was exactly the legal notion of the person which was utilised in *Adversus Praxean* by Tertullian, a thinker who undoubtedly was aware of the basic notional categories of the Roman law. In his exploration of the mystery of the Holy Trinity he claimed that the Father, the Son and the Holy Spirit are different persons, although one should acknowledge that each of the persons in the Trinity is one and the same God (Tertullian 1973). This conceptual solution of the problems surrounding the Holy Trinity was not accepted immediately however. It only came about in the fourth century AD during a debate on the meaning of the Greek word *hypostasis* (Boethius 1918). The problem focused on in what way it was possible to express the fact that the Holy Trinity was one and tripartite at the same time. The unity of the Trinity had been express by saying that the Trinity is one substance (*ousia*, *substantia*), while the tripartite nature had been captured with the help of the Greek term *hypostasis*. The problem was that *hypostasis*, like *ousia*, was translated into the same Latin word, *substantia*. In order to eliminate misunderstandings, the translation was altered to *subsistentia*. However, by the fourth century this subtle distinction had fallen into obscurity, a direct way to conceptual problems or even heresy. As a result, they reverted to Tertullian’s notion of *persona*: it was formulated as God is one but in three *personae* in documents from the Council of Alexandria in 362 AD.

However, in the sixth century the controversy arose once again. In his work *Contra Eutychem et Nestorium*, Boethius introduced his own formulation – and perhaps the most famous – of the definition of a person: *persona est rationalis naturae individua substantia*: a person is an individual substance of rational nature (Boethius 1918). He explained that we “are related in this manner to what the Greeks called *hypostasis*” (Boethius 1918). Boethius differentiated between the notion of subsistence (*essence*) and substance. *Subsistentia* (*essentia*), related to the Greek term *ousia*, refers to being which is not impaired (i.e., enjoys the so-called independent existence). In turn, *substantia* (*hypostasis*) refers to being which may be the basis for impairment (impairment may belong to it). A person (*persona*) is that *substantia* which is individual and rational. In the conception of Boethius, man is simultaneously *subsistentia*, *substantia* and *persona*.

Meanwhile, God is a unified *subsistentia* but also three *substantiae* (and thus three persons). Boethius highlights, however, that talking about the three divine substances has been forbidden by the Church as it leads to certain heresies. What is interesting in this consideration is that Boethius 'inverts' the traditional translation of the Greek concepts. Normally '*ousia*' is identified with '*substantia*' and '*hypostasis*' with '*subsistentia*'.

The notion of the 'person' played, perhaps surprisingly, a minor role in Scholastic ethics, largely remaining at the service of theology. Józef Bocheński noted:

There is no equivalent expression to 'person' in Aristotle, in his philosophy. It does not feature yet this has not stopped him from becoming one of the greatest moralists in history. In St Thomas Aquinas, the expression *persona* often features in dogmatic theology. Yet in moral philosophy it appears only once, namely in his article *De acceptione personarum*. It takes into account man in his personal relation to a candidate, not his value. It is the only example in which St Thomas uses the expression 'person' in his ethics, which does not prevent him from being a great moralist (Bocheński 1998: 130).

The close connection between the notion of the person and Thomism only featured with the twentieth century Personalists. This fact is important for two reasons. Firstly, Personalism, even though it was not an official doctrine of the Catholic Church, played a role in the conceptions of its representatives which is hard to overestimate. As a result, Personalism has become undoubtedly one of the most important voices in bioethical discussions. On the other hand, however, it is important to stress that the marriage of Thomism with the Personalist approach is, while at least historically charming, artificial. For Boethius, the notion of the person had a technical character. Its introduction was indispensable in terms of Boethius's great effort of trying to unite Greek philosophy with Christian faith. It was not meant to – and did not – play a crucial role in ethical discussions. Such a utilisation of the notion of the person is much later. Put plainly, it became a reaction to different conceptions of the person which have arisen in modern times.

## 1.2 The Early Modern Conceptions of the Person

At the forefront of these theories, two undoubtedly stand out: the conceptions of Locke and Kant. In *Essays Concerning Human Understanding* Locke wrote: "we must consider what PERSON stands for; which, I think, is a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places" (Locke 1961: 280). Locke formulates in this passage the *psychological* conception of a person: the crux of personhood is the ability to reflect and, in particular, to reflect on oneself and thus have a feeling of identity in different times and places. This vision is fundamentally different from the classical conception of the person. It is important to remember that Locke is one of the main philosophers responsible for the "subjective turn" in philosophy, the appreciation of the subject which Descartes undertook – more or less *explicite* – with his fundamental ontological division of the *res cogitans* and the *res extensa*. In

other words, in modern philosophy the person is not a psychophysical unity – the person is a thinking subject, *ego cogitans*. Such an understanding of the person is opposed by Kant in his *Critique of Pure Reason*:

By this *I*, or *he*, or *it* (the thing), which thinks, nothing is represented beyond a transcendental subject of thoughts = *x*, which is known only through the thoughts that are its predicates, and of which, apart from them, we can never have the slightest concept, so that we are really turning round it in a perpetual circle, having already to use its representation, before we can form any judgment about it. And this inconvenience is really inevitable, because consciousness in itself is not so much a representation, distinguishing a particular object, but really a form of representation in general, in so far as it is to be called knowledge, of which alone I can say that I think something by it (Kant 2007: A346).

Kant thus argues that the psychological definition of a person is inadequate since – at the level of theoretical reason – any potential representation of the self already presupposes a kind of personal identity, which is a form of cognition. Self is not a representation but an empty idea, whose only role is to unify our inner experiences. Things change as soon as one considers the practical reason. In the *Metaphysics of Morals* he states that “A person is a subject whose actions may be imputed to him. Moral personality is therefore nothing other than the freedom of a rational being under moral laws (whereas psychological personality is usually understood as an ability to be conscious of one’s identity in different conditions)” (Kant 1996: 6232). In other words, for Kant the person is defined by the fact that she is responsible for her own acts. This conception may be termed the *ethical* theory of the person. It is worth emphasising again that it was developed against the backdrop of Kant’s metaphysical project. As we know, Kant attempted to show that metaphysics – at the level of theoretical reason – is impossible. He stated that in our cognition, such notions as the world, the soul or God could correspond to no object. Those notions played a role of the transcendental ideas whose task is to organise our experience. Metaphysics is possible, however, on the grounds of practical reason and it was to this sphere that the Kantian notion of the person belongs.

The above presentation of the three most important conceptions of the person – the classical, the psychological and the ethical – shows that attempts to compare these views abstracted from their general metaphysical background, from the very foundation on which they were constructed, is a senseless task. One may not refer to the classical definition of Boethius if one does not *simultaneously* accept the metaphysics of Aristotle, which was structured by the ontological principles of form, matter, cause and goal. The psychological conception is rooted in the fundamental separation of mind and body. Finally, the ethical conception is groundless for those who ignore the basic Kantian distinction between theoretical and practical reason. In other words, each of these three basic definitions of the person are accompanied by metaphysical baggage; accepting any of them commits us to a certain view of the world.

### 1.3 The Contemporary Debate Over Person

The twentieth century debate over the notion of the person – broadly speaking – lies between two positions. The first may be termed the descriptive and the second, the axiological. The descriptive conception of the person stems mainly from analytic philosophy, directly tied to the tradition of Locke, and defines the person according to certain empirical (mental) criteria. In turn, the axiological approach places emphasis on the fact that the person is a bearer of values. In this school, the positions are of the classical (mainly Thomist) and – perhaps more importantly – the Kantian and neokantian origins.

One of the most famous examples of the descriptive theory of the person is that proposed by Peter Singer. It defines the person as the bearer of certain mental attributes: an ability to feel and understand, self-awareness and autonomy, the ability to imagine oneself in the future, etc. These characteristics are not fulfilled by all people – e.g. those who are in a coma. On the other hand, such an understanding of personhood may be ascribed to some animals (e.g., non-human primates) (Singer 1975). A similar position has been expressed, already quoted in this essay, by Hugo Engelhardt: “Not all people are equal. [...] Not all people are persons. Not all people are conscious, understanding and able to praise or criticise something. A foetus, a newborn, the mentally handicapped, those in a deep coma – are examples of people who are *nonpersons*” (Engelhardt 1996: 135–138).

Advocates of the descriptive conception of the person – at least those who are engaged in a reflection of an ethical character – do not limit their deliberations to such definitions. These definitions are used in ethical discourse. The descriptivists claim that a person is someone entitled to certain rights whereas non-persons are not entitled to such. For example, Singer claims, with the support of his conception of the person, that in ethics and law it is necessary to reject the dichotomy of ‘human – non-human’ and put in its place a division of ‘person – non-person’, in which rights are ascribed to persons only. Singer’s theoretical manoeuvre is typical for the advocates of the descriptive conception of the person. A ‘person’ is defined solely on the basis of descriptive, psychological criteria, but then the definition is utilised normatively, to decide legal and ethical controversies. Thus, the descriptivist approach suffers from a kind of ‘methodological schizophrenia’: the notion of the person is defined descriptively, but used normatively.

Another approach is offered by the advocates of the axiological conception of the person. In this case, the ethical value of a person is ontologically prior and defines personhood. In such a consideration, the person is independent of any contingent mental attributes which stem from, for example, a serious impairment, or the stage of personal development (foetus, infant etc). The axiological view of the person may be ascribed to various contemporary philosophical schools, such as personalism or neokantianism. Of course, their conceptions of the person differ in more or less important aspects, but they share the conviction that the person is a bearer of values and hence a moral agent, responsible for her actions.

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## ARTICLES

### AN INQUIRY INTO PERSONHOOD\*

MARY T. CLARK

**T**HERE IS NO BELIEF CIRCULATING TODAY of ideas having come full-blown from the head of Zeus, least of all the idea of person. This concept has had a long evolution. This does not mean that nothing distinctive of human being was recognized until the term "person" was philosophically clarified. Recognition of human traits appeared in literature long before the word "person" was commonly used to denote an individual human being. It took the form of referring (implicitly or explicitly) to certain human characteristics, such as rationality, or to aspects shared with other entities, such as individuality. The possessor of such characteristics was generally denoted by words other than our now familiar term, "person."

#### I

The Hebrew Scriptures reveal that for the Hebrews the physical body was fundamental. In thinking of human existence they did not isolate mental processes from sense reactions and bodily feelings. The word "heart" was often used instead of a personal pronoun. In Judges 19, "Comfort thy heart with a morsel of bread" means "Give yourself comfort." In Exodus 33:14, "My face will go with thee," means "I will go with thee." The word *ruah*, or spirit, denoting breath or wind, referred to anyone who by physical energy and mental alertness was full of life. In many cases the word "heart" was used to bring together the feelings, motives, intentions, and other

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\* Presidential Address to the Metaphysical Society of America, Villanova University, March 13, 1992.

aspects of an individual as a whole. The word "heart" referred to psychic activity, not merely to a physical organ.<sup>1</sup>

In later biblical times certain aspects of the prophets<sup>2</sup> and the people are highlighted. In the community of Israel the personal "I" is important. The prophet articulates insight into God's wishes, and individuals respond or do not. We are shown the human being as a moral agent, and behavior as internally molded. The prophet's pleading is for something of great value, the very selves of the listeners. The choice is between the fountain of living water and broken cisterns that can hold no water—a human fulfillment or a self-dissolution. There needs to be an understanding of disaster and a response from within. Jeremiah gives this warning: "And you, O desolate one, what do you mean that you dress in scarlet, that you deck yourself with ornaments of gold, that you enlarge your eyes with paint: in vain you beautify yourself."<sup>3</sup> The Hebrews knew that God was not concerned with appearances but with the heart, their metaphor for person.

## II

Homer, a prephilosophical Greek thinker, described many activities which we today call personal. In the *Iliad*, thinking and feeling and deciding are attributed to the human being. Moreover, many words such as *thymos*, *menos*, *etor*, *ker*, *kradie*, *phen/phenes*, and *nous*, which denote functions, are used to personify the agent.<sup>4</sup> The ability of these words to substitute for one another provides for David B. Claus<sup>5</sup> the clue that they have a unity of meaning like "the individual agent" which is not derived from some identification with some bodily organ or process. Thus Claus rejects the widely

<sup>1</sup> See Hans Walter Wolff, *Anthropology of the Old Testament* (Philadelphia: Fortress Press, 1974).

<sup>2</sup> See Timothy Polk, *The Prophetic Persona: Jeremiah and the Language of the Self* (Sheffield: JSOT Press, 1984). Cf. S. J. L. Croft, *The Identity of the Individual in the Psalms* (Sheffield: JSOT Press, 1987).

<sup>3</sup> Jeremiah 4:30, as quoted in Polk, *The Prophetic Persona*, 46.

<sup>4</sup> A. W. H. Adkins, *From the Many to the One* (Ithaca: Cornell University Press, 1984), 22. Cf. R. B. Onians, *The Origins of European Thought* (Cambridge: University Press, 1954).

<sup>5</sup> David B. Claus, *Toward the Soul* (New Haven: Yale University Press, 1981), 7. Cf. Bruno Snell, *The Discovery of Mind* (New York: Harper, 1950).

held view of Bruno Snell that the Homeric characters are fragmented, with a man amounting to a mere aggregate of functions, open to the play of circumstances and the deeds of the gods. Claus calls into question the old view that primitive man did not act like a rational agent but was a field for the play of psychological and divine forces.

Only later, between Homer and the fifth century B.C., did the terms "body" and "soul" evolve so that Homer's eschatological *psyche* began to designate the soul as a whole; and the word *soma* was gradually used for the living body instead of a corpse. Although the holistic use of *psyche* may not have resulted completely from sixth century Pythagoreanism, the latter stimulated a new use of *psyche*.<sup>6</sup> The Pythagorean teaching of the significance of number as a principle of knowledge, of cosmic order, and of harmony in human life (private and public) relates to an intellectual and moral aspect of the human soul, today called self-transcendence. Pythagoreans emphasize a right relation between soul and body and between human beings, that is, friendship. The implication of a judgment followed by transmigration accented individual responsibility while it failed to appreciate the intimate relation of body and soul.

John Burnet is surely not right in concluding that *psyche* or "self" came into being only with Socrates.<sup>7</sup> Previous philosophers had widened *psyche* from the Homeric life-force into an intellectual and moral agent. Heraclitus spoke of the "dry soul as wisest and best."<sup>8</sup> Moreover, the medical tradition indicated an intimacy between soul and body by recommending soul therapy to cure the body, and health guides to improve the soul.<sup>9</sup>

### III

Plato combined the Homeric view of the *psyche* as an animating function with the fifth century view of *psyche* as the seat of thought,

<sup>6</sup> Claus, *Toward the Soul*, 13-26.

<sup>7</sup> John Burnet, "The Socratic Doctrine of the Soul," in his *Essays and Addresses* (London: Chatto and Windus 1929), 140.

<sup>8</sup> Heraclitus, frag. 118 Diels (trans. K. Freeman). See also, "It is hard to fight against impulse; whatever it wishes, it buys at the expense of soul"; frag. 85 Diels.

<sup>9</sup> Claus, *Toward the Soul*, 153-5.

desire, and will, and with the Pythagorean view of its capacity for transcendence. This comprehensive Platonic view appears in the early dialogues, especially in the *Apology* and *Crito*. In the *Alcibiades* the soul is presented as merely spiritual and cognitive without relationship to body. In the *Phaedo*, however, the cognitive function is not isolated from the animating function. The unity of the individual is made apparent in the *Crito*, with the unification of the moral and the animating soul;<sup>10</sup> in the *Laches*, with the unification of morality and knowledge;<sup>11</sup> and in the *Laws*, with the subordination of life-functions to thought and feeling.<sup>12</sup>

Plato's philosophical approach to personhood is best shown in the *Phaedrus* and the *Timaeus*, where the *psyche* is directly created by the Demiurge upon the model of the Good for union with body. Plato does not make the sharp distinction, which begins with Aristotle and which is found in later Platonism, between *Nous* and *Psyche*; nor is the Platonic attitude here toward bodies as hostile as sometimes stated. For Plato, even the gods have bodies. Human souls will eventually return to star-bodies. On earth they had a mission of introducing rational order to make the temporal world the best possible likeness of the divine. The *Republic* is an effort to create the community that can achieve this. Thus Plato, like some of his predecessors, recognizes as aspects of human beings not only self-consciousness and responsibility (myth of Er), but relatedness and friendship, as the basis of justice (*Symposium* and *Republic*). Recall also the myth of Protagoras where the gift of friendship comes from Zeus.

Above all in the *Phaedrus* Plato recognizes as distinctive of human beings the power over their own being through choice.<sup>13</sup> Speaking of the return to the world of Forms, he refers to a self-determination, deciding not merely about an action but about oneself. Souls must decide whom they want to be by choosing a special god to imitate. In that choice the soul takes on a special character. Then the choices in the cycle of incarnations are made by souls who have increased their own uniqueness. Plato here distinguishes be-

<sup>10</sup> The really important thing is not to live but to live well; *Crito* 48b.

<sup>11</sup> *Laches* 185e.

<sup>12</sup> *Laws* 896e-897b.

<sup>13</sup> See C. L. Griswold, *Self-Knowledge in Plato's Phaedrus* (New Haven: Yale University Press, 1986.)

tween what one is and who one is. In the myth of the charioteer he shows the soul's interiority absorbed in moral conflict. The natural desire for the good is there, but only a persuasive knowledge can unify the soul and insure its self-possession so that it can engage in friendship in the light of true beauty. Reason guides feeling and blind desires. Only reason knows what is good for the whole man. The person is bettered by following right reason which is not opposed to the good of the individual human being.

## IV

In the *Nicomachean Ethics* Aristotle mentions important aspects of personhood.<sup>14</sup> He analyzes human nature in all its powers in *De anima*. It is clear to Aristotle that the human soul and body are essential to what we call the human person. In the *Categories*, the individual is described as a numerical unity; it is without parts and yet is a numerical part of a species. Although itself indivisible, this logical individual is part of a higher reality. In the *Metaphysics*, however, Aristotle denies that genera and species really exist. Therefore, only individuals exist: substances or accidents. Individual substances are never part of anything else. The name "substance" is given to nonaccidental individuals to signify their independent existence, their agency, their support of accidents. Accidents and actions are intrinsic to substances. The notion of substance as static is a non-Aristotelian notion, a notion that derives from Locke and his modern successors. James Felt has shown in an extended study that Aristotle conceives substances as dynamic and interrelated.<sup>15</sup> Becoming, as analyzed by Aristotle, is intrinsic development. In the *Metaphysics* he states that "pure form" is

<sup>14</sup> *Nicomachean Ethics* 78a-b, 1112a18-1113a16, 1100a10-1101a21.

<sup>15</sup> James Felt, "Whitehead's Misconception of 'Substance' in Aristotle," in *Process Studies*, 14 (Winter 1985): 224-336. See also *Physics* 202b6-8: "It is not absurd that the actualization of one thing should be in another. Teaching is the activity of a person who can teach, yet the operation is performed on some patient"; and *Metaphysics* 1075a16-23: "The world is not such that one thing has nothing to do with another, but they are all connected." Cf. Reto L. Fetz, *Whitehead: Prozess Denken und Substanz-metaphysik* (Freiburg: Karl Alber, 1981). Three chapters of this are translated by James Felt, *Process Studies*, 19.1, 19.3, 20.1.

primary substance;<sup>16</sup> in its own way it is an individual. He also calls the form of a natural object a "this."<sup>17</sup> The form designates capacity and remains the same through changing matter.<sup>18</sup> Natural objects are also substances. The name "substance" is loosely applied to matter as a potential object, as well as to artifacts. Forms themselves are not subject to substantial change. The individuation of the human being's soul-form does not eliminate its essential nature which all human beings share, but adds a relationship to matter indistinctly quantified which individuates it. Pure forms are different as forms. All substances are individual,<sup>19</sup> although not all individuals are substances. Such entities were called things or beings, but no ontological actuality called "being" has, for Aristotle, an actualizing role.<sup>20</sup> Human substances are given by Aristotle many personal characteristics: aspiration, deliberation, free choice, virtue, friendship. Some say that he identifies the human being with mind, such as at the end of the *Nicomachean Ethics*; but it can be said that if you accept the Arabic interpretation of *De anima* 3.5, he has removed from the human being the individual intellect for which one receives the name "person."

## V

Plotinus, unlike the classical Greek thinkers, indicates that the differences among human beings are spiritual. He investigates the metaphysical foundation of such differences by exploring the transcendent. His equivalent words for the term "person" are *autos* or *hemeis* or *anthropos*. Among the triad of the One, the *Nous*, the All-Soul, he places the Platonic forms in the *Nous*. For Plato, we know, such forms are universal, albeit concrete ones. Plotinus, however, says the following:

No, there can not be the same forming principle for different individuals, and one man will not serve as model for several men differing

<sup>16</sup> *Metaphysics* 1029b-1030b, 1037a, 1041a.

<sup>17</sup> *Ibid.*, 1037a25-26, 1037a28-30.

<sup>18</sup> *Ibid.*, 1039b24-26, 1070a22ff.

<sup>19</sup> Cf. S. R. Dickerson, *Comparison of Aristotle and Strawson on the Concept of a Person* (Ann Arbor: University Microfilms), 1980, 1-161.

<sup>20</sup> *Metaphysics* 1040b21-40, 1028a21-44. See also Thomas Aquinas, *On Separate Substances* 8.44: "For the existence of a thing is neither its form nor its matter" (my translation).

from each other not only by reason of their matter but with a vast number of special differences of form. Men are not related to their form as portraits of Socrates are to their original, but their different structures must result from different forming principles.<sup>21</sup>

It is clear that Plotinus considers this uniqueness a value. The higher part of the human soul remains in the intelligible realm but it truly belongs to a unique human being. Transcending oneself by identifying with one's higher self as an intelligence open to truth is characteristic only of human beings meant for eventual union with the One. The union occurs through *eros* for the Infinite Good freely consented to. This union is open to all, and those who fail to attain it should not blame their heredity or environment. On this point A. H. Armstrong notes the following:

Socrates as a person in his metaphysical reality would only begin to appear and be fully operative when he began to make something of what his country and city and period and parents and bodily nature had given him, to use his circumstances as material for free and responsible moral decisions and to find in them the way back to self-realization and self-transcendence.<sup>22</sup>

Without using the term *prosopon* (his substantive equivalent is *psyche* or "this soul"), Plotinus retains aspects of personhood of which Plato, Aristotle, and the Stoics were aware, and adds a special relationship of the human soul to the Transcendent. He expresses amazement at the great dignity, which so many ignore, of human souls. Plotinus speaks of the historical human being which includes the body.<sup>23</sup> The self is not without its vegetative, sensitive, intellectual levels, and it must choose with which level to identify. By its dominant way of life the soul makes itself to be alive on one of these levels. One should not become so preoccupied with organizing the sensible world that one fails to look within and discover one's *Nous*. Only on the level of *Nous* one can become aware of the Good.<sup>24</sup> By returning to one's highest level one identifies with transcendent *Nous* and is enabled to experience the Good to whom one is dynamically related. One then becomes totally oneself and as an individual

<sup>21</sup> *Enneads* 5.7.1., in Plotinus, *Enneads*, trans. A. H. Armstrong (Cambridge: Harvard University Press, 1984).

<sup>22</sup> A. H. Armstrong, "Form, Individual, and Person in Plotinus," *Dionysius* 1 (1977): 49-69.

<sup>23</sup> *Enneads* 4.3.27, 4.8.18, 4.7.1.

<sup>24</sup> *Ibid.*, 5.6.5.



person can act in the world as provident for all of reality. This universal mission takes precedence over concern merely for one's own body.

## VI

A number of scholars attribute to the theological tradition the sharpening of the distinction between person and nature, although that tradition never separated them. Although the word *prosopon* was probably used by Panaetius<sup>25</sup> in the second century B.C. in his work *On Duties*, which led Cicero to distinguish between human nature and the individual human being in *De officiis*, this word did not then become strictly philosophical as it did with inquiries into the Incarnation of Christ (one divine person acting through two natures) and into the Trinity (three divine persons in one being).

This philosophical investigation of the person-reality leading to a general concept of person is a paradigm case for the historical reality of Christian philosophy. Etienne Gilson says that he would "call Christian, every philosophy which, although keeping the two orders formally distinct, nevertheless considers the Christian revelation as an indispensable auxiliary to reason."<sup>26</sup>

Divine Revelation stimulates interest in special topics such as God and man and their relationship. Christian philosophy is a stage of knowledge between faith in God and the vision of God, namely, a stage of faith plus an understanding achieved by reason. As noted, the Greeks promoted a philosophical understanding of many aspects of personhood. Gilson remarks that "because they never denied the reality of the individual, the Greeks opened the way for the Christian recognition of the eminent worth of the person; not only did they not prevent it or even simply retard it, they did a great deal to forward its success."<sup>27</sup> They did not, however, directly ask, What does it mean to be a person? Thus Gilson thinks that Chris-

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<sup>25</sup> See Cornelia J. de Vogel, "The Concept of Personality in Greek and Christian Thought," in *Studies in Philosophy and the History of Philosophy*, vol. 2, ed. John K. Ryan (Washington, D.C.: The Catholic University of America Press, 1963), 20-60.

<sup>26</sup> Etienne Gilson, *The Spirit of Medieval Philosophy* (New York: Scribners, 1940), 37.

<sup>27</sup> *Ibid.*, 189.



tian thinkers were the first to explore explicitly the reality of personhood.

In agreement with Gilson today is John D. Zizioulas, a Greek Orthodox bishop and theologian who claims that a theology of personhood directly prepared the way for a philosophical understanding of personhood.<sup>28</sup> He argues that the term *prosopon* had no ontological content in the Greek classical world. It referred to a mask, something added to one's being, or it referred to the eyes.<sup>29</sup> Thus an ontological content to the term *prosopon* in the Greek tradition was given through the effort to express one's understanding of faith in a triune God. To say that God is Father, Son, and Spirit, without ceasing to be one God, is to say that each is the same Being/Substance (*ousia*). The Greek Fathers used the word *hypostasis* (a term that meant a concrete existent like Aristotle's first, as distinct from second, substance) to assert that each of the Three really existed. In using their word *hypostasis*, which was equivalent to *ousia*, the Greek Fathers, according to Zizioulas, provided ontological content to the word *prosopon*, the Greek equivalent for *persona*. *Prosopon*, like *persona*, was associated with mask, and the Greeks considered it a word that was too weak to stand for the subject "I." They resisted using it for fear that it would signify God in three roles and so lead to Sabellianism. This concern about Sabellianism, that is, considering the divine Three as modes or faces of one substance, led to making the word *prosopon* and the word *persona* ontological terms in theology rather than theatrical or cultic terms. The Latin fourth century theologians did not share the Greek fear in using *persona*, for they were aware not only of its use by Hippolytus and Tertullian in discussing the Trinity, but of its use in grammar to denote various speaking voices, its Roman legal use to denote those who could bring their claims to court, and its everyday use in the Latin world to denote a human being. They did not want *persona*, however, when referred to the Trinity, to denote incommunicable substance. Pierre Hadot reports that already a fourth-century Latin grammarian said that "person is a rational substance."<sup>30</sup>

<sup>28</sup> John D. Zizioulas, *Being as Communion* (New York: St. Vladimir's Press, 1985).

<sup>29</sup> H. Stephanus, *Thesaurus Graeca Linguae*, vol. 6, col. 2048.

<sup>30</sup> Pierre Hadot, "De Tertullien à Boèce," in *Problèmes de la personne* (Paris: Mouton, 1973), 123–34.

From the fourth century on, *prosopon* and *hypostasis* became interchangeable, as can be seen especially in the Council of Chalcedon. In their liturgy the Greek Orthodox theologians continued to prefer *hypostasis*, understood as the total subject. The Latin theologians, however, recognized that in using the term *persona* in a Trinitarian context as meaning a distinct possessor of one divine substance, the distinction of divine persons had to have a different origin from that of human persons who are substantially different. In studying Scripture the Church Fathers realized that what distinguished the Three was paternity, filiation, and procession—all divine without temporal priority. The divine persons are primordial. Divine being is therefore personal being—being common to Three: one divine unity, each of the Three distinguished by its proper relation to the others, relations that are internal to the Divine Being, not accidental.

The Greek Fathers taught that by grace, or the gift of love (*agape*) communicated by the Holy Spirit, human persons are deified and called to communion in Trinitarian life. In patristic thought, both Eastern and Western, the human person is better understood from above than from below. The human person, according to Genesis, is an image and likeness of God. The term “image” meant that man could receive God; a person is *capax Dei*. The term “likeness” had to do with the love expressed through interpersonal relations. Through love the human person is, as it were, like God in being creative of others by actions that are loving and promotive. Such likeness can remain undeveloped or be lost. Thus, patristic theologians made a contribution to the evolution of our understanding of personhood by their sustained reflection on persons, divine and human, as distinct possessors of intellectual and loving being.

## VII

Augustine of Hippo is a fourth-century Western Church Father who attempts to clarify the use of the word “person” to denote Father, Son, and Spirit. He was unhappy in speaking of three persons in God when the word “person” ordinarily denoted a substance. In that vein he declares that “person” said of God is an absolute name

referring directly to the divine being.<sup>31</sup> He searches for some special reason that the Three in God are persons. "Person," he says, "is a general name to such an extent that one uses it in speaking of men, although there is such a difference between God and men."<sup>32</sup> What the word "person" ordinarily denoted (an intellectual substance) was common to the Three. Although Augustine does not explicitly identify person with the relative in God, he says that Father, Son, and Holy Spirit are distinguished by relative opposition.<sup>33</sup> In his *Commentary on John's Gospel*, he says, concerning the number three, "Only in their relation to each other do they suggest number, not in their essential existence."<sup>34</sup> In the thirteenth century Aquinas will bring together "substance" from the Aristotelian tradition and "relation" from the Augustinian tradition to speak of the divine persons as "subsistent relations": infinite being as interpersonal because self-communicative. He will do this through his metaphysical analysis of being-as-act, and therefore dynamically active and relational.

As to the human person, Augustine highlighted important aspects such as interiority, memory as self-presence, openness to transcendence, the distinction of person from nature.<sup>35</sup> In his later writings he says firmly that the human being is simultaneously soul and body<sup>36</sup> (a union without confusion), living in time that is linear rather than cyclical.<sup>37</sup> Free choice, he says, is natural to the will which accompanies reason for the sake of attaining the true Good. Its reality insures that human destiny is not equal to fate. To reach one's destiny, a long dialogue between the human and divine will ensues, as shown in the *Confessions*. When the true Good is definitively chosen, the will is stabilized in the Good, dynamically taking

<sup>31</sup> "Non enim aliud est deo esse, aliud personam esse sed omnino ideam. Nam si esse ad se dicitur, persona vera relative. . . . Ad se quippe dicitur persona, non ad filium vel spiritum; sicut ad se dicitur deus et magnus et bonus it iustus et si quid aliud huiusmodi"; *De trinitate* 7.6.11. Cf. 5.6.7, 5.8.9, 8.1.1.

<sup>32</sup> Ibid., 7.4.7.

<sup>33</sup> Ibid., 5.5.6, 5.9.12, 5.14.15.

<sup>34</sup> Augustine, *Commentary on St. John's Gospel*, tr. 39.4.

<sup>35</sup> "Aliquid singulare atque individuum personas natura," that is, person versus nature (in common); *De trinitate* 7.6.11.

<sup>36</sup> Augustine, *Letter* 137, 3.11.

<sup>37</sup> Augustine's *City of God* provides a theology of history, implying linear time.

delight in it. He calls this condition of the will its true freedom (*libertas*).<sup>38</sup> Free choice, available for evil or good, is a necessary condition for reaching freedom (*libertas*). The choice of a good here and now takes place in accord with the will's reality as a desire for happiness. This desire is the human person's vocation to the truth and goodness which characterize infinite being.

## VIII

In the sixth century Boethius gave the first explicit philosophical answer to the question, What is a person? The answer for which he is famous is, A person is an individual substance of rational nature. He had available to him the philosophical and the patristic traditions. His reading of Aristotle's logical treatises and Porphyry's *Isagoge* led him to an in-depth study of individuality and the individual.<sup>39</sup> In his commentaries the term "individual" is not restricted to a human being, as indeed it should not be, but he often uses proper names, taking the human being as a paradigmatic case. In his commentary on Porphyry he makes the individual the result of accidents. Later, in his commentaries on Aristotle's *Categories* and *On Interpretation*, he identifies an individual with substance, noting that individuality is manifested by accidents. The specific nature is common to all members of a species; singularity is incommunicable to all, proper to one. The individual ontologically precedes accidents.<sup>40</sup>

His definition of person appears within a theological treatise on Christ as being one Person possessing two natures, divine and human. He studied the human person before discussing the Person of Christ.<sup>41</sup> Finally, in *Theological Treatises* 1, 2, and 5, he considers Persons in the Trinity. Whereas in *Treatise* 5 his terminology in

<sup>38</sup> See my *Augustine, Philosopher of Freedom* (New York: Desclée, 1959).

<sup>39</sup> See Jorge Gracia, *Introduction to the Problem of Individuation in the Early Middle Ages* (Washington, D.C.: The Catholic University of America Press, 1984). See also Jorge Gracia, *Individuality* (Albany: State University of New York Press, 1988).

<sup>40</sup> See Maurice Nédoncelle, "Les variations de Boèce sur la Personne," *Revue des sciences religieuses* 29 (1955): 201-38.

<sup>41</sup> Boethius, *Liber de persona et duabus naturis contra Eutychen et Nestorium*, chap. 3.

reference to the Trinity is confused (he speaks of one essence and three substances), in *Treatise* 1 and 2 he admits that plurality in God is not ordinary otherness. He uses the word "person" to denote otherness and follows Augustine in making "opposed relationships" distinctive of the three divine persons. Coming to the discussion as a logician, Boethius nevertheless recognizes that divinity is beyond the terrestrial logic of including attributes in a substance, and that God is beyond the categories. Number in the Trinity comes from relative attribution while the substance maintains its unity. The divine relations are eternal, for the Father was always Father, and so forth.

## IX

In the twelfth century, William of St. Thierry, a Cistercian, wrote an article against Abelard's use of nonpersonal categories in writing on the Trinity.<sup>42</sup> Reflecting on the words of Genesis that man and woman were made to the image of God, William argues to the existence of human responsibility as the ability to respond to a "thou." He concludes that this existential intentionality, or call to be an image of God, indicates an intersubjective personal structure. The paradigm of such intersubjectivity is the mutual reciprocity of Persons in the Trinity. He then defines the human person as an intellectual subsistent having spiritual existence, an existence that gives human beings a power to relate to the totality of being. Yet as an embodied spirit the human person is limited and numerically differentiated. This individuation is a source of separation and affects the potentiality for intersubjectivity. As embodied spirits, human persons are objectifiable and can all too readily be viewed as only objects. The community possible between persons can be jeopardized by objectification.

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<sup>42</sup> William of St. Thierry, *Disputatio adversus Petrum Abaelardum ad Gaudfridum Carnotensem et Bernardum*. T. M. Tomasic summarizes Abelard's objections in this way: "One merely creates problems that do not really exist by attempting to separate the absoluticity of the Persons from their relational situation"; T. M. Tomasic, *William of Saint-Thierry Against Peter Abelard: A Dispute on the Meaning of Being a Person, Analecta Cisterciensia* 1-2 (1972): 66. "Relationship in the Trinity, in a perfect Community, cannot be anything but the Essence of God, that is, a perfect unity of intersubjectivity" (p. 69).

In the same twelfth century Richard of St. Victor criticized the Boethian definition of person as not being a good definition of a divine person. He offered another definition: "an incommunicable existence of a divine nature."<sup>43</sup> For Aquinas, however, *Ipsum Esse* is the divine nature. Aquinas later proceeds to justify Boethius's definition by placing "individual" within the more extended notion of "distinctiveness." He then focuses on the way persons in God can be distinguished. Although a general definition of person can be formulated, person as applied is an analogical notion. For Aquinas, the ontology of human personhood requires a reference to a unique act of existence from which issue nature, individuality, the complete subsistence, active self-presence, and self-communication.

## X

Thomas Aquinas had at his disposal an even richer philosophical and theological tradition than Boethius. He knew how the word "person" was used in the doctrines of the Trinity and the Incarnation and was aware of various philosophical definitions. Divine Revelation sparked his interest in finding a definition of person applicable to God, to angels, and to human beings. Man experiences his own individuality, and himself as an individual.<sup>44</sup> Aquinas speaks of this as "incommunicability." This is a negative term for a positive feature of being the ultimate principle of attribution, and being ontologically self-possessive—the ground of what we call personal responsibility.<sup>45</sup> Aquinas experienced in himself and others the power to universalize and to choose freely, indicating some degree of immateriality.

At an early age, in his work *On Being and Essence*, Aquinas argues for existence as really distinct from a finite essence. The

<sup>43</sup> Richard of St. Victor, as quoted in Thomas Aquinas, *Summa theologiae* (hereafter, "ST") I, q. 29, a. 3, ad 4. For person as analogical see ST I, q. 29, a. 4, ad 4; I, q. 29, a. 3.

<sup>44</sup> "For substance is individualized by itself; whereas accidents are individualized by the subject; ST I, q. 29, a. 1. Cf. ST I, q. 29, a. 3, ad 4.

<sup>45</sup> "In a more perfect and special way, the particular and the individual are found in rational substances which have dominion over their own actions. . . . Therefore, also individuals of rational nature have a special name among other substances; and this name is *person*"; ST I, q. 29, a. 1.

essence or nature limits the existence which actuates it. Therefore, personal existence is the source not only of the essence but of the "individualness" of a human person to whom it gives ontological unity, since it is as existents that things differ from one another. This personal existence, grounding as it does, incommunicability, Aquinas calls "subsistence." He calls a person a distinct subsistent of an intellectual nature.<sup>46</sup>

The divine persons, Aquinas says, are subsistent relations; angels are unique forms; human persons are body-spirit structures. God's very being is to be related as Father, Son, and Holy Spirit, each one a subsistent relation, a person.<sup>47</sup> These relations are really distinguished among the divine persons<sup>48</sup> but as subsistent relations they are only conceptually distinct from the divine being. In a human person nature is a constituent, but personhood is neither a part of nor an addition to the human being. The human person receives all its reality from a unique act of existence which both specifies and individuates through the potential principles it actuates. Aquinas speaks of this role of existence in a key text:

What I mean by *esse* is the most perfect of all, and this is apparent from the fact that actuality is always more perfect than potentiality. Notice that no form at all is considered as actual unless some existence is understood as present, for humanity . . . can be viewed as existing within the potentiality of matter or within an agent's power or even within an intellect, but it is made to be actually existing only by having existence [*esse*]. So obviously, this existence [*esse*] is the actuality of all acts and therefore the perfection of all perfections. Neither may we think that this existence [*esse*] has anything added to it so that this "something added" would be more formal than it and would determine it as act determines potentiality . . . ; it cannot happen that what is added to existence is anything extraneous to it, because there is nothing that can be extraneous to existence [*esse*] except, obviously, non-being, but then non-being can be neither form nor matter; and therefore existence [*esse*] is determined by something other, not as potentiality is determined by act, but rather as act is determined by

<sup>46</sup> This definition arises from assembling Thomas's answers to objections to Boethius's definition being applied to God. Cf. *ST* I, q. 29, a. 1, c. and ad 1; I, q. 29, a. 4. Cf. I, q. 3, a. 5; and Thomas Aquinas, *De potentia Dei*, q. 3, a. 1, ad 17.

<sup>47</sup> *ST* I, q. 40, a. 2, c. and ad 1, 2, and 3.

<sup>48</sup> The word "person" "signifies relation directly and essence indirectly"; *ST* I, q. 28, a. 3. "Not, however, the relation as such, but as expressed by way of an hypostasis; while in God the hypostasis is expressed as distinct by the relation"; *ST* I, q. 29, a. 4.



potentiality . . . ; in this way this existence [*esse*] differs from that existence [*esse*], for it is the existence of this or that nature.<sup>49</sup>

Evidently the human essence does not limit the existence it receives to a wholly material mode of action, since knowing, choosing, and loving extend beyond the sensible. The human person includes a rational form or soul, an indistinctly determined material principle, an individuating principle, and subsistence, that is, a kind of existence which confers independent reality with powers of acting materially and spiritually.

In saying that "person" refers to that which is most perfect in the whole of nature, Aquinas links this perfection to existence that is rational and relational.<sup>50</sup> By rationality knowledge is not confined to sense data. The basic knowing experience is of something, of a thing, of a being; and the judgment that something exists is the first opening to being in an unlimited way. One experiences an *élan* toward being as true and as good, often awakened in the experience of beauty. Through this "intentional being" in mind and will a person is enriched and enabled to share more perfection with others. In finite being as act there is a dynamic polarity of receiving and giving. The openness to being through self-transcendence, far from removing a person from the natural world, increases relations with all beings, both personal and impersonal. Aquinas notes that "the soul of man is in a way all things by sense and intellect; and thereby, those realities that have knowledge in a way approach to a likeness to God in whom all things preexist, as Dionysius says."<sup>51</sup> Knowledge, by increasing one's intentional or cognitional existence, adds to the perfection of intelligent beings without altering the objectivity of what is known. Moreover, it is the nature of every actuality to communicate itself as far as possible. Through the self-communication which occurs through action, and which brings a communion of minds and hearts when the action is what John Macmurray calls "communal action," the personal agent participates more profoundly

<sup>49</sup> Thomas Aquinas, *On the Power of God*, q. 7, a. 2, ad 9, in *An Aquinas Reader*, trans. Mary T. Clark (New York: Fordham University Press, 1988), 85-6.

<sup>50</sup> *ST* I, q. 19, a. 2; I, q. 29, a. 3; I-II, q. 6, a. 2, ad 2; Thomas Aquinas, *De veritate*, q. 1, a. 1. Cf. Norris Clarke, "To Be is to be Self-Communicative," *Theology Digest* 33 (Winter 1986): 441-54; and Mary T. Clark, "The Human Person and God," *Downside Review* 84 (1966): 15-30.

<sup>51</sup> *ST* I, q. 80, a. 1.



in being and looks out upon the world from the personal centers of others.

## XI

In the ancient world, according to the available literature, there was an awareness of the distinctive rationality of a human being, sometimes of its unity, often of its relational aspect. Various thinkers highlighted one aspect or another, often identifying the self with one, such as rationality. In some current literature there is a tendency to equate observable aspects or actions with personal reality, often involving disputes as to what is the most significant or equivalent aspect. In this way the wholeness of the person is eclipsed. While the ancients tended to highlight the soul, the current tendency is to highlight consciousness or the body which, of course, entails temporality; therefore, some want to replace nature with history. A human person, however, is present whenever a human essence (human soul and matter) is actuated by an *actus essendi*, even when aspects associated with mature persons are not immediately observable.<sup>52</sup>

In the past and in the present human beings were and are recognized to be individuals. The ancients saw this as a sign of inferiority. Why did the fact of Athenian democracy not promote greater appreciation of the individual? For Plato the universal was more real than the individual: he even viewed individuals as accidental parts of a substantial state, saying in the *Laws* that "all must be common to all, even eyes, ears, and hands."<sup>53</sup> As for Aristotle, the individual seems to be for the sake of the species. Although Aristotle recognizes important personal aspects in the *Ethics*, yet in the *De anima* the human being can seem almost entirely

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<sup>52</sup> "What is necessary and sufficient to be a human person is to be a whole bodily individual which—unless he or she ceases to be, which can happen to anyone—will remain the same individual while developing continuously into a grown man or woman. Now, whatever, remaining the same individual will develop into a paradigmatic instance of a substantial kind already is an actual instance of that kind"; Germain Grisez, "When Do People Begin?" *Proceedings of the American Catholic Philosophical Association* 63 (1989): 27–47

<sup>53</sup> *Laws* 739c.

impersonal if one accepts the Arabic interpretation of the intellect as common to all thinkers. Aristotle does say that the first actuality of any organism is the soul which disposes the organism to be what it is from the very beginning,<sup>54</sup> but for him is this an intellectual soul? On the other hand, with Pythagoras the individual is not subordinate to the state if he has the duty of directing his own destiny toward a transcendent reality. Boethius had the benefit of both the philosophical and the patristic traditions. He knew that the term "person" must serve to distinguish one individual from another, so a person could not be identified with rationality only. He learned not to identify the individual with accidental features. He knew that the word "person" had to include the whole human reality, that "hypostasis" denoted individual subsistence. He said the following: "It is evident that the word 'person' has for substrate 'nature' and that 'person' cannot be attributed outside a nature."<sup>55</sup> He saw that although rationality is knowable through common properties, and individuality observable through singular accidents, both derive from a concrete substance.

Until the medieval period any being, including a human one, was seen as equivalent to its concrete essence, inclusive of accidents. We noted that Thomas Aquinas derived the value of realities from a distinct metaphysical principle which actuates all essences, namely, the act of to-be (*esse*) caused by subsistent *esse*, which simultaneously produces the potential essence. Without a real distinction between essence and existence, that which is knowable through a concept and that which is knowable through judgment, it is difficult to see how things could ever begin or cease to be. Yet they do begin and cease; and nonexistent essences are valueless. It is fruitful, therefore, to inquire into the connection between person, and being which both individuates and unifies. In this connection is grounded the value of every human person, which has both a human and divine source,<sup>56</sup> an irreplaceable temporal vocation, and a destiny beyond death by reason of its spiritual *esse*.

<sup>54</sup> *De anima* 412a19–22, 414a18; *Metaphysics* 1040a35.

<sup>55</sup> Boethius, *Contra Eutychen et Nestorium*, chap. 3.

<sup>56</sup> See Thomas Aquinas, *Summa contra gentiles* III, chap. 66; *On the Power of God*, q. 3, a. 7. In these places Aquinas discusses the concurrence of divine causality with finite causality; the first cause acts in all causing of *esse*.

Whereas biologists speak of human beings rather than of persons, a philosophical analysis shows that the term "person" is not simply a subjective value-term. It refers directly to all human beings as valuable because of their greater participation in being as manifested in mature persons through self-presence, self-determination, and self-communication. In a sense, the way to approach an understanding of the ontological content of unlimited being is to explore the being called personal.

In Thomas Aquinas's view, a human person is more perfect than the whole of nature. He did not simply attribute this perfection to a human person. Factually, a human person is a greater revelation of unlimited existence or unlimited perfection (the only possible source of finite existents) than other realities are. Awareness of the contingent existence of the human composite can, on reflection, make one aware that existence is received from infinite personal being, relating one to personal being at its greatest intensity, having all human perfections without their limitations. Adequate self-awareness would then include an awareness of this relationship and one's relation to all others through participation in existence. Moreover, in the personal experience of knowing and choosing, with their unlimited pursuit of truth and goodness, infinite personal being is obscurely present, that is, nonobjectively. This is because the unlimited Good is a lure in every choice. This unobjective experience of the enabling condition for human knowledge and freedom is an experience of God—one not always raised, however, to thematic knowledge.

Thus an inquiry into personhood does not proceed by abstraction but by penetrating into the metaphysical structure of the human person whose proper activities are unintelligible apart from their orientation to being as true and good. We become aware of Being through beings by the exercise of perception and judgment; of its causality through the contingency of beings; of its spiritual dynamism through a study of human beings who are windows into the nature of Being as total act, actively communicating being (in the Trinity as self-communication, in the universe by creating finite beings). Infinite Being is the apex of life and knowledge, of freedom and love.

The dignity and value of all human beings derives ultimately from their individual creation and their destiny to return to their divine source. This dignity can be recognized by their greater metaphysical likeness to that source as active self-presences and

self-communicators. John Rist holds that Plotinus, among the ancients, was close to recognizing the intrinsic value of all human beings. Plotinus says, "Although the One is present to those who look, it is only a very small minority who look."<sup>57</sup> Rist remarks:

We are quite near the view that all "persons" have intrinsic value, from which could flow a doctrine of intrinsic rights; but despite his doctrine of the self, his novel version of the theory of man as a "divine spark" with its special relationship between the soul and the One, Plotinus still holds to the ancient position that insists that value and rights must be claimed by mature human beings. If we neglect virtue, we neglect our value; and if we neglect our value, we lose it.<sup>58</sup>

If persons are made persons by human existence they never lose their value. Consider how the connection between person and being is the basis for an affinity with all persons and all things. If a unique act of spiritual existence makes one a person in his or her own right, so it is with other persons. To be personal is to live and act with awareness and concern for the ethical claims of others. As Levinas says, what we encounter in the face of another "is the infinity of his transcendence,"<sup>59</sup> "an immediate presentation of self,"<sup>60</sup> "an appeal for responsibility."<sup>61</sup> What appears, the face of the other, has the form of law. "Thou shalt not commit murder" is written on the face of the other.<sup>62</sup> "That the face of the other conveys the idea of the Infinite"<sup>63</sup> is the pivotal point of Levinas's ethical metaphysics. It is also true that the human knower as open to all being is the only one who can act on being's behalf, providing for the interests of animals and of physical nature.

The distinctive personal activities of knowing and loving and choosing, which point to a spiritual existence (*esse*) activating and unifying the human organism, do not eliminate the temporal or historical conditions of humanness nor diminish the importance of a person's sensitive and physiological actions, or the value of the

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<sup>57</sup> John Rist, *Plotinus and the Value of the Human Person* (unpublished lecture), 7.

<sup>58</sup> *Ibid.*, 15.

<sup>59</sup> Edith Wyschogrod, *Emmanuel Levinas* (The Hague: Martinus Nijhoff, 1974), 86. Cf. Emmanuel Levinas, *Totalité et Infini* (The Hague: Martinus Nijhoff, 1961).

<sup>60</sup> Wyschogrod, *Emmanuel Levinas*, 87.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, 88.

<sup>63</sup> *Ibid.*, 89.

body. Intellectual activity, for the most part, originates in sensible knowledge. (Aquinas's theory of knowledge entailed "man in the world" long before Heidegger articulated the phrase.) All too easily the expression "self-transcendence" can give the impression that to be a person one must live the life of a spirit. What actually happens is that as a body-spirit complex, the person, shares the spirit's existence and goals with bodily powers. The human soul as subsistent is the form of the matter organized into a human body. The soul-spirit does not come to be except in union with matter. The basic experience of reality is made possible by body. Even for the self-communication proper to spirit, the body is necessary. Through bodily action we express personal thoughts, desires, decisions, feelings—verbally and nonverbally. Only through bodily actions does the architect, the artist, the musician produce his works. Only through the body is the world made a more human one in the carrying out of spiritual choices made by persons. Insofar as one's material environment and one's space-time situation are certain "determinations," a person's freedom is necessarily limited by bodily existence, as is obvious in the case of the physically disabled and economically deprived. On the other hand, some of the richest human experiences which develop a human person come through bodily activities in the enjoyment of art, play, music, food, and emotional love. In promoting humanness they are spiritually enriching. If the body can impede personal growth, it can also enhance the personal existence it shares.

It might be more helpful to speak of metaphysical self-identity rather than self-transcendence as an ideal for human persons. In the metaphysical order self-identity is fidelity to a unified personal structure, both given and affirmed. It is achieved through self-determination: determining the whole self to be a reality, not letting any level of life alienate itself from the human reality. A person who so acts fulfils his or her needs, but also acts out of love that is generous and creative. Thus the expression, "become what you are," paradoxical as it may seem, describes the challenge of being a human person. It marks the radical difference between personal and impersonal realities. The latter, unfree, are determined in being and action. The former, free, can say yes or no to human life, to being a person.

The quality of interaction with things and persons reveals the values attracting a person and the kind of self being chosen.

Spontaneous choices show the self because of the unity of action and being (*actio sequitur esse*). Although as a temporal being one can change one's actions for better or worse, the material environment, the culture, the actions of others either limit human freedom or promote it. A spiritual power, freedom in an embodied spirit is conditioned materially and psychologically, just as the intellect is somewhat conditioned by the health of the brain. That is why those who wish to promote communal activity on the part of persons, nations, and races need to provide favorable material conditions as well as education.

Aquinas teaches that since the soul shares its spiritual existence with the body, the body's death does not entail that of the soul.<sup>64</sup> Materialist philosophers may reject this, but it is not disallowed by at least one contemporary scientist, who has said,

If there is this ignorance of the way in which conscious experiences are related to the brain, there is no reason to deny the possibility that after the disintegration of the brain that comes with the death of the body, conscious selves may have other existences under quite unimaginable conditions. We must recognize that we cannot define how we come to exist as experiencing selves with our ineluctable uniqueness.<sup>65</sup>

Some scientists admit ignorance concerning personal survival; others deny this survival. Some philosophers have declared the possibility of some form of survival; and the Christian Revelation has affirmed the actuality of personal survival.

Augustine describes eternal life, begun on earth, as a community of those in love with God and with one another: such is his City of God. This emphasizes that reality at its most profound and enduring level is interpersonal, a reality that depends on whether per-

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<sup>64</sup> "The Creator gives existence to the soul in the body, while the begetter disposes the body to participate in this existence through the soul united to it"; *On the Power of God*, q. 3, a. 9, ad 20. *On the Soul*, a. 14 c: "It is apparent that the intellect has its own action unshared by the body. Now, anything acts in accord with its nature, inasmuch as things existing of themselves have their own action . . . the intellectual principle by which man knows has its own way of existing superior to that of body and independent of it. . . . We conclude that the human soul is incorruptible"; *Quaestiones disputatae de anima*, a. 14. Cf. *De ente et essentia*, chap. 5; *Summa Contra Gentiles* II, chap. 68.

<sup>65</sup> J. C. Eccles, "The Experiencing Self," in *The Uniqueness of Man. A Discussion at the Nobel Conference*, ed. John D. Roslansky (Amsterdam: North Holland Publishing Co., 1969), 133.

sons freely make communal choices (in Macmurray's phrase). The individualism present in American culture is spelled out in *The Habits of the Heart* by Robert Bellah and others, witnesses to a lack of communal choices. If reality is interrelational, then excessive individualism is psychological suicide. Two recent scientific reports note the positive effects of relating well even in physical nature:

Young nerve cells can wander far greater distances across the growing brain than anyone previously imagined. . . . And once the neurons have settled into a particular neighborhood, they learn what they are meant to do from signals that surround them, rather than from an innate genetic program.<sup>66</sup>

Another scientific team reported

that it had taken cancerous cells that had a genetic defect in their ability to communicate with each other, and then corrected the defect to restore the cancerous cells to apparent health.<sup>67</sup>

Because the human person is related on the existential level to Absolute Existence, on the human level to other persons, maintaining these relationships is essential to personal well-being. In this realm of relation the person nonetheless is free. The person's need to give has the same urgency as nature's need to have.<sup>68</sup> Altruistic love is grounded in personal existence. The concrete person acts out of ontological plenitude and poverty: giving and receiving. John Macmurray has described the primary interpersonal relation experienced by the human infant on the receiving side. The child is

born into a love-relationship which is inherently personal. Not merely his personal development, but his very survival depends upon the maintaining of this relation; he depends for his existence . . . upon intelligent understanding, upon rational foresight. He cannot think for himself, yet he cannot do without thinking; so someone else must think for him.

<sup>66</sup> N. Angier, "A Brain Cell Surprise: Genes Don't Set Function," *New York Times*, 28 Jan. 1992, sec. C, p. 1.

<sup>67</sup> "Clue to Cancer is Sought in Ways Cells Talk," *New York Times*, 21 Jan. 1992, sec. C, p. 1.

<sup>68</sup> "For natural things have a natural inclination not only toward their own proper good, to acquire it, if not possessed, and if possessed to rest therein, but also to diffuse their own goodness among others as far as possible"; *ST I*, q. 19, a. 2. See also "It is the nature of every actuality to communicate itself as far as that is possible. Therefore every agent acts according as it exists in actuality" *On the Power of God*, q. 7, a. 1. Cf. Robert Johann, *The Meaning of Love* (New York: Paulist Press, 1966).



His *expression of satisfaction* is closely associated with . . . the presence of the mother. . . . It would seem, from the biological point of view, unnecessary. There is no obvious utilitarian purpose in it. . . . It seems impossible to account for it except as an *expression of satisfaction in the relation itself*. . . . This is evidence that the infant has a need which is not simply biological but personal.<sup>69</sup>

The paradox of the person is that while existence or being is the source of his or her uniqueness, it is also the bond which unites one with others. As Gabriel Marcel says,

I have laid such stress on intersubjectivity precisely because I wish to emphasize the presence of an underlying reality that is felt, of a community that is deeply rooted in ontology; without this, human relations, in any real sense, would be unintelligible. . . . In more concrete language, I concern myself with *being* only insofar as I have a more or less distinct consciousness of the underlying unity which ties me to other beings of whose reality I have a preliminary notion.<sup>70</sup>

We see that it is not a case of a person being *either* substance or relational—a literal interpretation of Boethius or Marcel. If being is communion, then the person as subsistent both flowers out of communion and is supported or strengthened in singularity by communion. As Paul Henry, my first mentor in Plotinus and Augustine, said so well,

God is the perfect, in fact, the only perfect prototype of that which all love between persons tends to achieve—absolute unity and yet distinction—to be one with the other, not by losing one's identity but by perfecting it, even at the very source of one's being. That is why Divine Existence is the ideal of all personal existence—to be fully oneself, but only in dependence upon, and in adherence to, another in the communion of unity.<sup>71</sup>

## XII

In conclusion, it is worth noting that all of us are the persons we are trying to understand. In addition to our obvious external

<sup>69</sup> John Macmurray, *Persons in Relation* (New Jersey: Humanities Press, 1961), 49.

<sup>70</sup> Gabriel Marcel, *Mystery of Being*, trans. René Hague, vol. 2 (Chicago: Regnery, 1950), 17.

<sup>71</sup> Paul Henry, *Saint Augustine on Personality* (New York: Macmillan, 1960), 10.



life, each of us has privileged access to an inward life in possession of a unique self, expressed by the unique "I." We are aware of that which makes conversation and communion possible: having the inward life of another opened to us, sharing another's personal reality. I have been trying to make explicit what is implicit in all personal experience: a primary awareness of existence by perception and judgment; the relation of our minds to Being; the relation of our wills to Being; the experience of self-identity and self-communication; the experience of personal growth through interpersonal relations.

Such an inquiry into our closest and most mysterious reality has to remain open ended. It can continue to be assisted by phenomenology and the physical, human, and social sciences. Whatever is discovered, however, has to be probed metaphysically, because "existence" (*esse*) is a truly first actuality; it is existence which makes individuals of a certain nature. The mere identification of observable or knowable personal characteristics with personhood is a form of dualism separating person and human being. Another misconception is the separation of rationality from relationality.<sup>72</sup> The mind knows through its relation to Being; the will is free through this relationship; and love for the Good engages all one's capacities and energies. The so-called primitive peoples knew themselves as enmeshed in relationships; and there is no reason at all to attribute to Greek thinking a view of man as unrelated. On the contrary, in the three leading schools of Greek philosophy (Platonic, Aristotelian, and Stoic) human rationality was assumed to be relational, and with the Roman Boethius it was not any different.

We have manifested our relationality in joining a metaphysical society. Is not metaphysical thinking a communal activity? Initiated by oneself, it is done with and for others. We have all gained

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<sup>72</sup> The history of the notion of the human person as sketched here shows that both bodiliness and relatedness are intrinsic to a human individual. In her 1990 APA Presidential Address, "A Naturalist View of Persons," to what view is Annette Baier opposing the naturalist view? Is it to that of Descartes and Kant? Why not say that? She speaks of the opposite view as that of the theological tradition but gives no references to a theological work. A view of the human person as equivalent to the soul alone is the view neither of the theological tradition nor of the Thomist metaphysical tradition nor of the Augustinian tradition. See the *Proceedings and Addresses of the American Philosophical Association* 65 (1991): 5-17.

some illumination on the legitimacy or illegitimacy of our convictions and desires from past and present metaphysicians, and above all from those who with Socrates take seriously the Delphic Oracle's admonition: Know thyself. Socrates began to do this by inquiring. Unless we keep inquiring into what it means to be a person responsible to truth and for goodness, both subsistent and related, independent and interdependent, a unique person who is self-knowable, self-determinable, self-communicable, we can scarcely responsibly follow that other admonition given by one who wrote so well of the depths of misery into which a human person can descend, but wrote also of the heights of human grandeur to which a person can rise in choosing "to be" rather than "not to be" one's fully personal self:

To thine own self be true  
 And it must follow  
 As the night the day  
 Thou canst not then be false to any man.<sup>73</sup>

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<sup>73</sup> William Shakespeare, *Hamlet*, act 1, sc. 3, lines 78–80.

## **Legal Status: Animals, Dead and Unborn Person**

### **Introduction**

The main objective of this law is to protect the interests of the persons or animals who cannot speak for themselves and cannot protect their rights by themselves. The law has several provisions for them. The article includes the rights and the duties of the unborn child, dead person and the rights of the animals which is explained with the help of legal terminology, maxims, legal provisions and case laws. The juristic personality of different persons living, non-living or a thing is explained in the present article. All those acts which are beneficial for others are liable as lawfully and are in favour of protecting the interest of mankind. But the act done in order to exploit someone's rights and morals is punishable and it is an unlawful act.

The concept of legal personality and the rights of the dead person, unborn child and animals are elaborated in this article.

### **Legal Personality**

The origin of the word person is driven from the Latin word 'persona' which means a mask worn by an individual playing different roles like in the drama. The word personality originates from the same word root which denotes the 'member of Trinity'. The personality is the integration of all traits which are the status, role and reputation of the person in a society. Legal personality means that the person is enjoying their legal status. In the eyes of law legal status or juristic personality means that the person is able to protect his own rights and duties. There are basically only two types of people: one is natural and other is legal. The natural person is who is capable of deciding what is right and wrong and capable of bearing rights and duties. Legal person is nothing but an artificial custom of law. The legal personality are those to whom the law vested the rights and duties.

The word 'Status' has different meanings. Salmond has given four meanings of the word status

1. Legal condition of any kind, whether personal or proprietary.
2. Personal legal conditions, excluding proprietary relations.
3. Personal capacities and incapacities as opposed to other elements of personal status.
4. Compulsory as opposed to conventional legal position.

In other words status means the condition which arises due to the membership of a particular class or group and also affects the right and duties of the members of that class. The general principle of status is that when created by the law of one country, it ought to be judicially recognised all over the world.

### **Legal Status Of Animals**

The legal system of modern law does not consider animals as a person. Therefore, they don't have legal rights and duties. But in the ancient law and some of the other provisions the animal being held liable for their wrongful acts. In the ancient times when an ox kills a man then that ox will be stoned in the wall and the flesh of that ox will not be eaten.

The modern law does not consider the right and duties of the animal rather they consider it as the rights and duties of the owners of the animal. This means that the owner of the animal will be liable for the wrongful act of his animal. The liability arises on the master is not because of vicarious liability ( the master be held liable) but because of the negligence of the master to control his animal in causing harm. This can be explained by an example, a man was the owner of a ferocious dog. He was well known about the ferocity of his dog and then also has not taken any precautions. One day the dog was unleashed and bit a man. In this case, the master or the owner of the dog is liable as he is negligent.

There are two principals where we can say that a animal can possess some legal rights:

Cruelty to animals is criminal offences.

A trust for the benefit of a particular class of animals, as opposed to one for individual animals, is valid and enforceable as public and charitable trust.

Section 11 of Prevention of Cruelty to Animals Act,1960 made it punishable that whoever causes cruelty to anyone's animal either by beating, causing pain, kicking, torturing or forcing them to overload. Any of the acts done will be punishable under this act. The rights and freedom are guaranteed to the animals by the Constitution of India under Article 51 A (g)(h) which is the Magna Carta of animal rights.

In the case of Animal Welfare Board of India v. Nagaraja, it is stated that Article 21 of the Constitution of India will safeguard the rights of all humans and protect their lives. The definition of the word 'life' is expanded and explained that it includes all forms of life including animal lives and all the animal has honour or dignity. Every species has an inherent right to live and is required to be protected by the law.

The cases where the animals are poached either for their skin, bones, teeths and flesh or for the purpose of hunting is strictly banned. The implementation of such laws is still in question and there is still the need to increase the strictness for the laws regarding the protection of rights of animals.

In the case of Pettingall v. Pettingall, it is laid that the trust for the benefit of the Animal's maintenance can be made. The charitable trust is created for the promotion of public welfare and the advancement of religion. The testator has left a deed for the horses and dogs for as long as they live. The trust deed was held valid and enforceable by law.

### **Legal Status Of Dead Person**

The right of a person begins from his birth and ends when he dies. But there are some of the provisions where a dead man can protect his rights after his death as well. It is true that the legal rights of a dead person are no longer present but some of the provisions are there even after their death. The dead person loses their personality with their life. But the legal testaments, will or any kind of deed made by a dead person while alive, will be obeyed by the law even after his death. These testaments will not be changed or barged by anyone in any condition. This means that if a person has a will after death, then his property will be inherited by his legal legates. And if the will does not include any kind of disposition of property in favour of legal legates, then in that case the will is not enforceable.

In law, the dead are not a person, but a thing. The juristic personality comes from the birth and goes when the person is dead. After death they are not entitled to any rights but there are some of the rights they can possess even after death. The rights are:

- Right of reputation
- Right of will
- Right of decent burial

The reputation of a dead person is protected by the law. The defamatory statement made on a dead person will affect the living members of the family. When someone defames a dead person, then it is actionable in the court as it will affect the family of the dead person emotionally and mentally. Under Section 499 of the Indian Penal code, it is a punishable offence. If the sentiments of the living member of the deceased person's family get hurt, then the person defaming will be held liable. Thus, defamation is actionable in this case.

Similarly, with the case of right to will. The person has a right to write a will before his death and make it enforceable with the help of his lawyer. So, the distribution of the property can be done accordingly. The property will be distributed among the legal legates and the heirs of the deceased person. The person who writes the will is the testator and the legal heirs are the legates. The will is called a testamentary document.

In the eyes of law, a dead man's corpse is a property which can be disposed of by any instrument. But the law ensures that the dead man's corpse must get a decent burial and a proper cremation ceremony. Now in the modern law, the man in his will make a valid trust for the repairs and maintenance of his graveyard.

In the case of *R v. Price*, it is said that any violation of the grave is a crime. Every man's corpse is entitled to a decent burial. Similarly, in the case of *Williams v. Williams*, it is said that the testamentary directions of a man as to the disposal of his body are without any binding force.

### **Legal Status Of Unborn Person**

The child in the mother's womb has the same rights as that the child will possess after the birth. The maxim '*Nasciturus Pro Jam nato* bachelor' explains the legal status of the unborn child. The legal fictions regarded the unborn child as an already born child. The Latin maxim that refers to law protects and guards the rights of the foetus which can be right related to property, shares of the undivided family, inheritance etc. It says that the unborn is deemed to have been born to the extent that his own benefits are concerned. The term *Nasciturus* means the one who is about to be born or a conceived foetus. This concept was first found in Roman laws and after that European and American law as well in respect of inheritance. In the case of *Elliott v. Joicey*, it is stated that the legal fiction is only applied for the benefit of the child who is yet to be born.

In criminal law also if any harm is caused to an unborn child in the womb of the mother it will be considered as an offence. Under Section 315 of Indian Penal Code, killing a child in mother's womb was a crime but not a felony and if the child was born alive and thereafter died of the pre-natal injuries, it was murder. This can be explained by a case *R v. Senior* in this case the child's head was extruded from the mother's womb and the surgeon intentionally crushed the skull of the child. The surgeon is liable for the offence of manslaughter. Thus is

liable for imprisonment. In Criminal Procedure Code under Section 416 It is stated that a woman who is sentenced to death is found pregnant, then execution of the sentence will be postponed until the child is born and also after the birth of the child attains a particular age.

The rights of an unborn child whether it is proprietary or personal are contingent on his birth as a living being. The legal personality of the dead person is not present but this not the case with the unborn child. The law presumes the child is yet to be born and there is nothing in law to prevent the person from owning property before he is born. In the case of inheritance, the man can settle his property to his wife and child to be born stated in his will or may die intestate and his unborn child will inherit his estate. The provisions for the same are provided in Family law. The Hindu undivided family also has the provision for the same. If the Karta dies and his wife is pregnant, the shares of the Hindu family will be divided considering the child to be born as living and the unborn child will also get the shares in the property. Even the posthumous child also has the right to property and may inherit, but if he dies in the womb of stillborn, his right to inheritance fails and is not in effect. The legal exception of this is that it is exclusively applied for the purpose of inheritance and the conditions must satisfy for its validity is that the child is unborn and is yet to be born.

### **Conclusion**

Legal status is given in order to protect the interests of such people who either cannot have the ability to do so or not in a position to protect their own rights. As explained in Article 21, the word life also includes the life of an animal as well as those things which affect the life of a human being. In a recent report it is said that all types of animals whether flora and fauna are considered as legal entities. Like a dead man cannot protect his or her certain rights which they can enjoy even after death. An unborn child cannot exercise its rights and not even protect them. So, there are certain legal provisions where the rights of an unborn can be protected. Same is with the case of animals, they cannot speak, tell and fight for its rights. That's why there are various provisions for the protection and safeguard of animals. In this way their rights can be protected and no one can exploit the rights of others for their selfish needs.

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## Living Property: A New Status for Animals Within the Legal System

David Favre

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# LIVING PROPERTY: A NEW STATUS FOR ANIMALS WITHIN THE LEGAL SYSTEM

DAVID FAVRE\*

*This Article develops the proposition that non-human animals can possess and exercise legal rights. This proposal is supported by the fact that our legal system already accommodates a number of animal interests within the criminal anti-cruelty laws and civil trust laws. To make a more coherent package of all animal-related public policy issues, it is useful to acknowledge the existence of a fourth category of property, living property. Once separated out from other property, a new area of jurisprudence will evolve, providing legal rights for at least some animals. This Article establishes why animals should receive consideration within the legal system, which animals should be focused upon, what some of the legal rights might be, and how the traditional rules of property law will be modified to accommodate the presence of this new category of property.*

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In the text of this Article, the author may refer to an animal with the pronouns “his,” “her,” “she,” “he,” or “who.” An animal is not a sexually neutral “it.” All the animals referred to in this Article are either male or female. A car is an “it,” or a computer perhaps, but an animal should not be an “it.” Perhaps the rules of property have long supported the rules of grammar by placing animals with nonliving things. Respect for the animals should compel us to refer to them as living beings, not inanimate objects.



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## I. INTRODUCTION

Humans have interests in possessing, owning, using, and protecting lawfully obtained property. This is all well and good, and has been the case since the beginning of human civilization. However, what if some of the objects, some of the property, have interests independent of the humans who own them? This raises a conflict that is different from the usual individual human versus individual human or individual human versus human society conflicts with which the law most often struggles. However, this is not a universal problem with property; it arises only in the case of a special category of property, living property.

Only living entities can have interests. Since the 1860s in the United States, the legal system has been trying to ascertain the best way to deal with the animal subset of the category of personal property. The law, initially just at the state level, has adopted protective provisions for animals.<sup>1</sup> In doing so, the law has stretched the attributes of personal property to accommodate this special class, but the fit is not good. For example, given the reality that many

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1. These laws are generally found within the category of state anti-cruelty laws. See *infra* Part II.C.

humans attach an emotional, personal value to their pets, the present position of the law that says that damages to property are primarily measured by the fair market value of the property, constitutes a large disconnect between public expectations and the rules of property.<sup>2</sup> To deal with this and many other issues, it is time to formally acknowledge a new category of property, that of living property. Inherent in acknowledging the interests of animals, which justify the creation of the new category, will be the creation of legal rights to assure that these interests are given some measure of weight in the decision making of the legal process.

A premise of this Article is that it is ethically acceptable to continue to have animals within a property status. This premise is contrary to the beliefs of a number of individuals in the field of animal rights, particularly those who self-identify as abolitionists. Among these writers, the first order of business is the elimination of the property status of animals, and then making animals (or some subset of animals, such as primates) legal persons. This author rejects this path forward. The key ethical question upon which the basis of this Article diverges from the abolitionists is whether it is acceptable for humans to keep, possess, and use animals. Their answer is “no,” and at least some members of this school of thought push the non-use analysis to the point of asserting that humans should not keep, own, and use pets.<sup>3</sup> This author rejects their ethical position upon the belief that positive human communities can include animals that are owned and used by humans.

This Article does not further consider the general ethical arguments of the abolitionists.<sup>4</sup> However, this Article does provide a comprehensive contrary view of the opinion often expressed by abolitionists: that animals will not be

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2. This disconnection is also reflected in the holdings of judges. An Illinois case from 2008 represents the dilemma. At trial court, a judge had held that the value of a pet dog was \$200 in a tort case (using a loose fair market analysis). On appeal, the court held that the value of the animal was at least the amount that the plaintiffs spent on veterinary bills to care for the dog after he had been attacked by the defendant's dog, \$4,782.72. See Dave Bakke, *Judges Rule on the Proper Value of a Dog's Life*, STATE JOURNAL-REGISTER (Springfield, Ill.), Jan. 4, 2009, available at <http://www.sj-r.com/news/x2094350144/Dave-Bakke-Judges-rule-on-the-proper-value-of-a-dog-s-life>.

3. See Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 134 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). Professor Francione is one vocal advocate of the abolitionist perspective: “And if the treatment of animals as resources cannot be justified, then we should abolish the institutionalized exploitation of animals. We should care for domestic animals presently alive, but we should bring no more into existence.” *Id.* This debate is international in scope. See generally HERON JOSE SANTANA GORDILHO, ANIMAL ABOLICIONISMO (2008) (written in Portuguese and published in Brazil).

4. For a full discussion of the moral and legal status of animals, see generally ANIMAL RIGHTS (Clare Palmer ed., 2008). This book is a collection of thirty-one reprinted essays from the major authors in this area. See also Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506 (2001) (reviewing STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000)).

able to receive legal rights so long as they remain the property of humans. Their position is without support, regardless of the number of times that it is stated.<sup>5</sup> Not only is it conceptually possible, but animals, or at least some animals, already possess limited legal rights. Admittedly, animal rights are not equal to legal rights of humans, but they are rights nevertheless.<sup>6</sup>

To support and explain the proposition of this Article will require a consideration of several primary issues: Does the legal system have the capacity to accept animals as juristic persons? How can animal legal rights be most usefully characterized? What impact would the creation of this new category have upon the rights of the human owners of living property? What legal rights ought to be allocated to those within this new category of living property? It is admitted that to give some status to animals will necessarily mean that the legal rights of some humans will be restricted. The advancement of intellectual, civilized society has always been marked by the dilution of legal rights for some in order to make way for the new rights of others.<sup>7</sup>

This Article shall first provide a brief consideration of the history of animals within the legal system and the system's capacity for change (Part II). A suggested matrix for categorizing legal rights will be proposed (Part III). Next, the nature and characteristics of the category of living property will be developed (Part IV). Finally, a revised set of rules for the human owners will be considered, followed by a list of proposed legal rights for animals (Part V). All of these topics could clearly fill a book, and perhaps in time will do so, but for this Article, the conceptual development is the primary task.

## II. HISTORY

### A. *Evolution of Categories of Property*

The common law legal system has its conceptual roots in the Roman law period. The Roman view of the world produced two fundamental categories: persons and things. Persons had access to the law and property law was written about things. Property law is an institution with four component parts: the persons who hold the rights, the relationships between persons, the objects to which property concepts attach, and sanctions for violations of the rules.<sup>8</sup>

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5. See Gary L. Francione, *Animals, Property, and Personhood*, in PEOPLE, PROPERTY, OR PETS? 77 (Marc D. Hauser et al. eds., 2006) ("I argue that if we are to take animal interests seriously, then we must accord animals one right: the right not to be treated as our property."); Bernard E. Rollin, *Animal Ethics and Breed-Specific Legislation*, 5 J. ANIMAL L. 1 (2009).

6. For an article proposing equal legal rights for animals, see Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65 (2009).

7. As women gained legal property and political rights, men saw a dilution of their property and political legal rights. See *infra* notes 34–37 and accompanying text.

8. 1 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 2.02 (Michael Allan Wolf ed.,

Property laws are written to deal with conflicting claims of the individual human against other individuals or society, generally regarding possession and use of “things” or land.<sup>9</sup> It is inherent in the nature of humans to seek to control objects or land obtained and possessed.<sup>10</sup> The protection of individual property from the demands of the state have even received U.S. constitutional protection under the Fifth Amendment, which limits the government’s taking of property, unless the use is for a public purpose and just compensation is provided.<sup>11</sup> Why this is the case and how to describe the origin of property law is beyond the scope of this Article, as there is much dispute among the writers of jurisprudence about the origin and organization of property issues.<sup>12</sup> Instead, the starting point will be that the concept of property exists and is well-entrenched in our legal thinking.

The standard discussion of property today lists three basic categories of property—real property, personal property, and intellectual property. These distinct categories are all under the umbrella of property law in that owners receive the benefits of ownership of property, as opposed to contract rights or claims under tort law. But there are three categories because each has unique characteristics that shape a different set of public policy concerns. Real property is fixed in place, visible for all to see and will last indefinitely (unless it is beachfront<sup>13</sup>). Records about real property can be put in a local courthouse and found by everyone. Personal property is physical, moveable, and has a limited physical existence. Historically, most personal property was of modest value.<sup>14</sup> Intellectual property is a product of a human mind.

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2009).

9. See 3 ROSCOE POUND, JURISPRUDENCE 103 (1959) (“In civilized society men must be able to assume that they may control for purposes beneficial to themselves what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.”).

10. See *id.* at 106 (“Indeed, taking possession of what one discovers is so in accord with a fundamental human behavior tendency that discovery and occupation have stood in the books ever since substantially as the Romans stated them.”). The application of these ideas played out in the awkward historic case of *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), in which the Court held the discovery of the land of the United States by the Europeans gave them superior title to the land occupied by Native American tribes. *Id.* at 567.

11. The importance and nature of the debate about protection of individual property ownership versus the needs of the state can be seen in the case of *Kelo v. City of New London*, 545 U.S. 469 (2005). In this case, the Supreme Court held that the city was allowed to take the title of the plaintiff’s property and transfer title to another private party for development because of the public good to be realized by the private development activity. *Id.* at 483–84.

12. See 3 POUND, *supra* note 9, at 105–55 (giving a full discussion of the various views of property over the centuries); see also GEORGE WHITECROSS PATON, A TEXTBOOK OF JURISPRUDENCE 505–52 (G.W. Paton & David P. Derham eds., 4th ed. 1972).

13. For an article on the relentless intrusion of the ocean, eliminating land and houses, see Alyssa Abkowitz, *Beating Back the Ocean Proves an Enduring Riddle*, WALL ST. J., Sept. 12, 2008, at A12.

14. For a brief discussion of how the category of personal property evolved out of real property

Historically, it resulted in a physical reality, like a book. Today, however, significant value can exist with property that has only limited real physical attributes, such as computer software.<sup>15</sup>

*B. Animals Are Part of Personal Property*

Some animals are, and have always been, categorized as personal property.<sup>16</sup> However, as the English common law developed, not all animals had equal presence or status within the law:

The common law regards and gives the greatest protection to those animals designated as “useful,” and the least protection to those *ferae naturae*. Useful animals [e.g., cattle and sheep] are regarded as having intrinsic value, and are given the same protection as is given to goods; but, at common law, animals of a base nature are not regarded as property to the extent of being subjects of larceny, nor could a criminal action be brought for maliciously killing an animal of a base nature [e.g., dogs and cats].<sup>17</sup>

The reader may be surprised to learn that dogs remained in this non-property status into the early 1900s.<sup>18</sup> This meant that the keeper of the non-

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concepts, see 1 POWELL, *supra* note 8, § 5.04. He suggests that it became separate as personal property items became economically valuable. *Id.*

15. John Paczkowski, Apple to Psystar: And Don't Get Any Bright Ideas About a Black Friday Sale, Either, All Things Digital (Nov. 25, 2009), <http://digitaldaily.allthingsd.com/20091125/apple-to-psystar-and-dont-get-any-bright-ideas-about-a-black-friday-sale-either/>.

And make no mistake, Apple legal is going to grind Psystar into fine silicon dust. In addition to the injunction, Apple is requesting compensation for legal costs and statutory damages owed under the Copyright Act and the Digital Millennium Copyright Act. And according to Apple's expert witness, statutory damages for the former should run “between \$1500 and \$300,000” and for the latter “between \$449,500 and \$4,495,000.”

*Id.*

16. For more details about the history of animals as property, see generally Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 68–69 (2002) (noting that the first U.S. judicial decision to authorize a property right in dogs was recorded in 1871); see also Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (1996); William C. Root, Note, “Man's Best Friend”: Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury, 47 VILL. L. REV. 423, 424 (2002).

17. FRANK HALL CHILDS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY, CHATTELS AND CHOSSES 35–36 (1914).

18. See DAVID FAVRE & PETER L. BORCHELT, ANIMAL LAW AND DOG BEHAVIOR 10–11 (1999). A clear statement of the legal status of dogs and cats did not appear in Virginia law until 1984: “All dogs and cats shall be deemed personal property and may be the subject of larceny and malicious or unlawful trespass.” VA. CODE ANN. § 3.2-6585 (2008). Connecticut did not change its

property animal could not look to the protections of the law; an owner could not call the police if her dog had been stolen or killed. If the human owner's interest in her dog was not recognized by the law, then clearly the interests of the dog also were not recognized. In a curious twist of social development, the interests of the dog would come to be recognized by the law, by the adoption of anti-cruelty laws, before the property status of the dog, protecting the interests of the owners, was established.<sup>19</sup>

### C. *The First Transformation on Behalf of Animals*

Throughout history, the social view of animals has been reflected in the provisions of the law. Up through the 1860s, the law was dealing primarily with the economic value that an animal represented.<sup>20</sup> Indeed, legal protection was provided for farm animals, not pets, as pets had no socially recognized value. However, beginning in the 1860s, there was a clear transition in the laws dealing with animals—from mere protection of the property interests of owners and the economic value of those interests, which did not restrict what an owner could do to her own animal, to concerns about the animals themselves, regardless of the actor.<sup>21</sup> The 1867 New York law,<sup>22</sup> promoted by

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law until 1949, when the following was adopted: "All dogs are deemed to be personal property. . . . Any person who steals a dog may be prosecuted under section 22-351 or under sections 53a-118 to 53a-129, inclusive." CONN. GEN. STAT. ANN. § 22-350 (West 2001).

19. In the 1889 Annual Report of the American Society for the Prevention of Cruelty to Animals (ASPCA), the following is found:

Thos. McCormac, [charged with] setting dogs to fight on the public highway. The offender was requested by a lady to cease urging the dogs to fight but he replied insolently, and encouraged them on the more. While so engaged, he was arrested by one of the Society's officers. Realizing his danger, he commenced to cry for mercy, and even appealed to the [lady] he had insulted. Sentenced to serve five days in jail by Judge Kenna.

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, TWENTY-FOURTH ANNUAL REPORT FOR 1889, at 18 (1890) [hereinafter ASPCA], available at <http://www.animallaw.info/historical/articles/arusaspcareport1889.htm>.

20. See CHILDS, *supra* note 17, at 36. Even as late as 1914, Childs spoke in terms of two categories of domestic animals: "Useful" animals were kept for food or fiber, while "base nature" animals "[were] kept for whim or pleasure, as cats and dogs." *Id.* at 35.

21. See generally David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. C.L. REV. 1 (1993).

An example of a statute that reflects the strict property concept of animals, which existed at the beginning of the nineteenth century, is found in Vermont legislative law. . . . Section 2 state[s] in part:

"Every person who shall wilfully and maliciously kill, wound, maim or disfigure any horse, or horses, or horse kind, cattle, sheep, or swine, of another person, or shall wilfully or maliciously administer poison to any such animal . . . shall be punished by imprisonment [of] . . . not more than five years, or fined not exceeding five hundred dollars . . . ."

"Every person who shall wilfully and maliciously kill, wound, maim or

Henry Bergh, founder of the American Society for the Prevention of Cruelty to Animals (ASPCA), created the conceptual breakthrough.<sup>23</sup> Thereafter, new laws were adopted by many states, based upon the New York model.<sup>24</sup> Besides the benefits to humans, the existence of these laws clearly reflects the legislatures' acceptance of the proposition that an animal's interest in being free from unnecessary pain and suffering should be recognized as a value within the legal system. In most states, the freedom from pain and suffering was allowed for all animals, whether or not the property of humans, and was certainly allowed for the dog.<sup>25</sup>

This new proposition was recognized by the courts of the time. In the case of *Stephens v. State*, the court found that:

This statute is for the benefit of animals, as creatures

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disfigure any horse, or horses, or horse kind, cattle, sheep, or swine, of another person, or shall wilfully or maliciously administer poison to any such animal . . . shall be punished by imprisonment [of] . . . not more than five years, or fined not exceeding five hundred dollars . . . .”

*Id.* at 7 (alteration in original) (quoting Act of Oct. 23, 1846, ch. 34, § 2, 1846 Vt. Laws 35).

Note that in this language there is no provision prohibiting the cruel treatment of animals generally. The list of animals protected was limited to commercially valuable animals, not pets or wild animals. The purpose of this law was to protect commercially valuable property from the interference of others, not to protect animals from pain and suffering inflicted by the owner. Finally, because the penalty was for up to five years of jail time, a violation of this law was a felony, again evidence of property protection.

22. Act of Apr. 12, 1867, ch. 375, § 1, 1867 N.Y. Laws 86 (current version at N.Y. AGRIC. & MKTS. § 353 (Consol. 2004)).

23. This may be considered to have occurred earlier in England. In 1822, the English Parliament adopted the Martin Act, which adopted humane standards for some animals. “[T]he animals included in the Act ceased to be the mere property of their owners.” HENRY S. SALT, ANIMALS’ RIGHTS: CONSIDERED IN RELATION TO SOCIAL PROGRESS 6 (New York, MacMillan & Co. 1894). But see an 1821 law from Maine suggesting a tentative earlier concern for the welfare of some animals. Favre & Tsang, *supra* note 21, at 8 (citing Act of Feb. 24, 1821, ch. IV, § 7, 1821 Me. Laws 60).

24. Within a few years, the following states had adopted the same pattern of legislation as that in New York, with both new criminal laws and the chartered creations of state societies for the prevention of cruelty to animals (SPCAs): Massachusetts (Act of June 2, 1869, ch. 344, 1869 Mass. Acts 712), Pennsylvania (XXIV PA. STAT. ANN. §§ 7770–7783 (West 1921)), Illinois (Act of Mar. 31, 1869, ch. 5a, §§ 1–3, 1869 Ill. Laws 115), New Hampshire (N.H. LAWS ch. 281, §§ 26–27 (1878)), and New Jersey (Act of Apr. 1, 1873, §§ 1–17, 1873 N.J. Laws 80, and Act of Mar. 25, 1875, §§ 1–2, 1875 N.J. Laws 40 (codified at N.J. REV. STAT. §§ 64–82 (1877))). As of 1904, most states had some type of organized SPCA. AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, THIRTY-NINTH ANNUAL REPORT FOR 1904, at 139–40 (1905), available at <http://www.animallaw.info/historical/articles/arusaspcreport1889.htm> (scroll down the page to see the 1904 annual report). See generally RICHARD D. RYDER, ANIMAL REVOLUTION: CHANGING ATTITUDES TOWARDS SPECIESISM 171–75 (1989).

25. As examples of traditional initial language, see CAL. PENAL CODE § 599b (West 1999 & Supp. 2010) (adding “every dumb creature” to the code in 1905) and MISS. CODE ANN. § 97-41-1 (2006), *invalidated by* Davis v. State, 806 So. 2d 1098 (Miss. 2001) (noting that the original 1880 statute used the phrase “any living creature,” which also appears in N.Y.’s 1867 law).

capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners.<sup>26</sup>

This point was also made in an Arkansas case in which the court acknowledged this new concern when it noted that the new laws

are not made for the protection of the absolute or relative rights of persons, or the rights of men to the acquisition and enjoyment of property, or the peace of society. They seem to recognize and attempt to protect some abstract rights in all that animate creation . . . from the largest and noblest to the smallest and most insignificant.<sup>27</sup>

These new laws clearly reflected society's acknowledgment that animals have interests in being free from pain and suffering.

However, it must also be recognized that the early laws also sought to balance these newly acknowledged interests of animals against human interests. The laws recognized that sometimes the human interests will supersede that of the animals', and pain and suffering might lawfully occur. Within the original New York law itself, this balancing existed. The critical prohibitions on beating and killing animals were modified with "unnecessarily" and "needlessly."<sup>28</sup> Thus, if a horse had to be hit to make him start pulling the wagon, or if an animal had to be killed to be eaten, such actions did not violate the law. Another clear balancing of interests occurred in the context of scientific experimentation. Section 10 of the 1867 New York law provided that properly conducted scientific experiments did not violate the law, thus allowing the intentional infliction of pain and suffering for the advancement of scientific knowledge.<sup>29</sup>

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26. *Stephens v. State*, 3 So. 458, 458 (Miss. 1888).

27. *Grise v. State*, 37 Ark. 456, 458 (1881).

28. The 1867 New York anti-cruelty law stated that

[i]f any person shall over-drive, over-load, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be over-driven, over-loaded, tortured, tormented or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated or killed, as aforesaid, any living creature, every such offender shall, for every such offense, be guilty of a misdemeanor.

Act of Apr. 12, 1867, ch. 375, § 1, 1867 N.Y. Laws 86 (current version at N.Y. AGRIC. & MKTS. § 353 (Consol. 2004)).

29. "Nothing in this act contained shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college or university of the state of New York." *Id.* § 10, 1867 N.Y. Laws 87–88 (current version at N.Y. AGRIC. & MKTS. § 353



Over the past fifty years, increasing social concern for the welfare of animals has resulted in modifications of the anti-cruelty laws. The requirement in the original New York law for providing food and water has been expanded significantly in many states to include food, water, shelter, and veterinary care.<sup>30</sup> Additionally, the punishment level for violation of these statutes has increased. For intentional acts of cruelty, punishment is now most often at the felony level rather than just a misdemeanor. In 1993, only seven states had felony anti-cruelty provisions; by 2005, forty-one states had some felony provisions.<sup>31</sup>

#### *D. Capacity for Change*

While property law is often slow to change, it does change over time as the moral and ethical perspectives of society change.<sup>32</sup> There are two key points to be briefly made here. The first is that society can change who is a legal person, and secondly, that different categories of legal persons often have different or more limited categories of rights. Indeed, legal rights often arrive in a piecemeal fashion, as the lawmakers see fit. The most obvious example of the first point is the transformation of African-Americans from the non-person status of slaves to freedom and legal personhood.<sup>33</sup>

As an example of the second point, consider the legal status of women several hundred years ago within the laws of the United States. When a woman married a man, the common law view at that time was that the woman's property interests were merged into those of the man, and the man had the full power of disposition of property that had previously been under the control of the unmarried woman.<sup>34</sup> This began to change in the 1840s,

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(Consol. 2004)).

30. For example, the Michigan law now states: "'Adequate care' means the provision of sufficient food, water, shelter, sanitary conditions, exercise, and veterinary medical attention in order to maintain an animal in a state of good health." MICH. COMP. LAWS ANN. § 750.50(1) (West 2004 & Supp. 2009).

31. Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 ANIMAL L. 131, 132 (2005).

32. From Powell's treatise on property law:

At any stage in human history the prevailing institution of property is chiefly an inheritance from the past. This inheritance, however, is subject to constant change. These changes represent efforts to workout adaptations to the new problems presented by new ingredients in the political, economic, and philosophical atmosphere of the moment. The fact of change is an ever-present phenomenon in society.

1 POWELL, *supra* note 8, § 2.06.

33. The legal realization of the status change is reflected in the Fourteenth Amendment to the U.S. Constitution. U.S. CONST. amend. XIV.

34. JOSHUA WILLIAMS, *PRINCIPLES OF THE LAW OF REAL PROPERTY* 223 (Philadelphia, T. & J.W. Johnson & Co. 5th ed. 1879). Before the formation of the United States, the common law of

with the adoption of Married Women Acts.<sup>35</sup>

An even more stark difference reflecting the different status of men and women deals with the legal right to have a voice in the political process, the right to vote. The moral/political battle by which women obtained the right to vote has been well covered by other writers of legal history.<sup>36</sup> Two points follow from this long battle. First, clearly women were always legal persons, but they were not treated equally with men. Thus, the legal system is capable of handling legal persons with different sets of rights. Secondly, the legal system is capable of piecemeal change in deciding which legal rights should be allocated to which legal persons. Therefore, our legislatures could decide that some animals, but not all animals, should possess some but not all possible legal rights. Such different treatment is fully within the common law tradition of this country. Indeed, incremental change is the norm, not sudden universal change.<sup>37</sup>

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England also held under the rule of primogenitor that males would inherit lands in preference to female heirs. On the death of a husband, a wife had the right of dower in her husband's land (a one-third life estate), but the husband had the right of curtesy in his wife's lands at her death, which was a full life estate. *Id.* at 223 n.1, 232.

35. See 41 AM. JUR. 2D *Husband and Wife* § 3 (2005).

The social order upon which the concept of legal unity between husband and wife was predicated no longer exists. During the nineteenth century, Married Women's Emancipation Acts were passed in all American jurisdictions. These were designed to confer upon married women a separate legal personality and to give them a separate legal estate in their own property. They conferred upon a wife the capacity to sue or be sued without joining the husband and, generally, as far as third persons were concerned, made the wife separately responsible for her own torts. From an early date it was recognized that a primary purpose of these statutes was to free the wife's property from the control of her husband.

*Id.*; see generally NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982); KATHLEEN S. SULLIVAN, CONSTITUTIONAL CONTEXT: WOMEN AND RIGHTS DISCOURSE IN NINETEENTH-CENTURY AMERICA (2007). In both these books, the process of legal change is found to be very slow, taking place over decades, not as a big one-time event. The legal system reluctantly changed; it was not transformed at any one point of time. See also 1 POWELL, *supra* note 8, § 6.02.

36. See generally DORIS WEATHERFORD, A HISTORY OF THE AMERICAN SUFFRAGIST MOVEMENT (1998).

37. See 18 PA. CONS. STAT. ANN. § 5511 (West 2000 & Supp. 2009). As a small example of different categories of animals receiving different treatment, consider some of the provisions of the Pennsylvania Anti-Cruelty Law. Under this law a person:

[C]ommits a misdemeanor of the second degree if he willfully and maliciously . . . kills, maims or disfigures any *domestic animal* of another person . . . .

[C]ommits a felony of the third degree if he willfully and maliciously . . . kills, maims or disfigures any *zoo animal* in captivity.

[C]ommits a misdemeanor of the first degree if he willfully and maliciously . . .

### III. THE ALLOCATION OF LEGAL RIGHTS

The present schemes for describing legal rights are inadequate to the task of identifying the path that is being followed for the creation of legal rights for animals. As will be explained, animals already exist as individuals within our legal system, but not in a systematic, focused way that is accessible to traditional writers of jurisprudence. To best grasp what our legal system has been doing, there must be a focus on the separation between the possession of a legal right and the exercise of the right. Animals are like infant children in that they can be recognized as legal persons, but do not have the capacity to understand or knowingly exercise any legal rights allocated to them. This has been particularly difficult for the animals as, unlike children, they are property and one of the legal mantras often repeated is that property cannot be the holder of legal rights. Yet, at least some animals can and have gathered legal rights. This has occurred despite the mantra asserting the contrary and obscuring the view of most observers of the reality of legal events in the United States.

#### A. *A Card Game*

To help visualize what has happened and what might happen in the future, consider the granting and using of legal rights as a multi-layered card game. Legal rights are represented by cards. Cards have different values, and without possessing cards, you cannot play. Further, just because someone has cards does not mean the cards will be well played. The government is the dealer of the cards, deciding both who gets the cards and what values the cards represent. One unusual aspect of The Rights Game is that those with cards can vote to direct the dealer to either give them more cards or take away cards already given out, or most importantly, to give cards to individuals who previously had no cards. (One complexity that we will not deal with here is that we have three levels of government: federal, state, and local. So, cards can be received from at least three different dealers.) In this game there is no limit to the number of players who can hold cards, or play cards, or number of cards that might be created. A critical aspect of this game is that cards can and often must be played by someone other than the original possessor of the card. Parents might hold and play cards allocated to their children, and with the right legal document, e.g., a power of attorney, children might hold and

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kills, maims, mutilates, tortures or disfigures any *dog or cat*, whether belonging to himself or otherwise.

*Id.* (emphasis added). The same act has three levels of punishment depending not upon the species of animal or even the market value of the animal, but upon the category of animal—pet, zoo animal, or those animals within a general “other” category. This is not rational from the perspective of the animals. It only makes sense in the context of what is politically important or acceptable within human legislatures.

play the cards allocated to their parents. Of course, the government (legislature) can deal itself cards for playing. Not every card that the government seeks to distribute is a lawful card, as the courts have the power to force the dealer to collect and destroy cards if the courts find that the government was without authorization, under the rulebook of the Constitution, to create the particular card. All of this is enough to suggest the context for the following, more focused discussion about animals in particular.

An animal, under the theory of this Article, has the capacity to be a player, a holder of cards. Two possible cards are: (1) the right to be free from pain (FFP) inflicted by the intentional acts of a human, and (2) the right to receive food adequate for a healthy life (Food). For the animals of New York, these cards were initially distributed by the New York legislature under the previously described New York anti-cruelty law.<sup>38</sup> Perhaps the value for the cards was low, but they were cards nevertheless. Humans also have FFP cards, but adult humans do not have the Food card held by animals and children. The government itself does not possess either a FFP or a Food card.

Now, what makes this game interesting and complex is that the cards come in three colors, with the color denoting not who can hold a card, but who can play a card. The colors are red, blue, and green. Red cards can be played only by government players (prosecutors), blue cards can be played by human players, and green cards can be played by non-human animals (by attorneys appointed to represent particular animals). Consider the FFP cards held by humans. They come in two colors: The red FFP card has to be given to a government player (a prosecutor) who will decide whether to play it by bringing criminal charges against the actor. Or, harmed humans may use the blue card to play themselves (as plaintiffs) in a civil law suit. The vast majority of the cards held by animals today are red and are created by a state's criminal anti-cruelty laws. Animals have legal rights, but cannot assert or play the cards themselves. Rather, the government has to be willing to reach over and take an animal's card and play it on the animal's behalf. So, those animals that possess red FFP cards are dependent upon the government player-prosecutors. Sometimes the government will play these red FFP cards, sometimes it does not. That the government does not play a card does not mean that an animal does not possess a card.

### *B. Card Characteristics*

To give some descriptive characterization to the cards, consider the red cards as representing weak legal rights, in that they can be played only by

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38. See *supra* notes 22, 28–29 and accompanying text.

government entities. Blue cards are strong legal rights and can be played by humans or some non-governmental group of humans (perhaps humane societies). They are stronger in the sense that legal action for protection of animal interests may be carried out by private parties, even in the absence of action by the government. Green cards represent preferred legal rights and can be played by animals directly.<sup>39</sup> This third category is what is traditionally considered the fullest realization of a legal right, but this is too narrow of a view. In the broader sense of the term, a legal right exists when a court is willing and able to consider a specific interest of a particular being.

### 1. Red Cards—Weak Legal Rights

Under the Michigan anti-cruelty laws, a number of red cards have been given to many of the animals within the state:

- The right not to be tortured.
- The right not to be killed without just cause.<sup>40</sup>
- The right to be provided with food, water, and shelter.
- The right to be provided with veterinary care.<sup>41</sup>

But, not all domestic animals in Michigan receive these red cards. For example, farm animals are specifically exempted from the state law if the action is a standard agricultural practice.<sup>42</sup> In Michigan, for unexplained reasons, zoo animals do not receive the red cards requiring proper care but do get the red cards to be free from torture.<sup>43</sup> Wild animals in Michigan receive the red cards for FFP, but not the Food card.<sup>44</sup> For perhaps understandable reasons, animal pests such as rats do not receive the red cards as well, depending upon the context in which the rat lives.<sup>45</sup> Under the Michigan law, these red cards are, by the statutory definition of “animal,” limited to vertebrate animals.<sup>46</sup> So, if an individual decides to torture a jellyfish or a zebra mussel, these animals have no cards for anyone to play. It is also true that farm animals do not receive any red cards from the Michigan law, or indeed, from the federal government under the federal Animal Welfare Act. Chickens commercially raised in the United States have nowhere near the

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39. Do not confuse the substance of this right with the practical procedural issues of how the right would be asserted.

40. MICH. COMP. LAWS ANN. § 750.50b (West Supp. 2009) (“[A] person shall not do any of the following without just cause: Knowingly kill, torture, mutilate, maim, or disfigure an animal.”).

41. *Id.* § 750.50.

42. *Id.* §§ 750.50(8)(f), 750.50b(7).

43. *Id.* § 750.50(8)(d); *see also* § 750.50b.

44. *See id.* §§ 750.50–750.50b.

45. *See id.* §§ 750.50(8)(e), 750.50b(8)(c).

46. *Id.* § 750.50(1)(b).

number of red cards that a pet cat receives, if indeed the chicken has any.<sup>47</sup>

## 2. Blue Cards—Strong Legal Rights

Blue card examples are represented by both some of the oldest cases filed by the ASPCA in New York and a twenty-first-century case filed by the Animal Legal Defense Fund in North Carolina. After the adoption of the 1867 Animal Act, the ASPCA, as a private organization, was authorized by the statute to file criminal prosecutions in the local courts for violations of that law alone.<sup>48</sup> The ASPCA would prosecute the case without the necessity of the state prosecutor being part of the process.<sup>49</sup> (Of course, the State of New York could prosecute if it chose to do so.) Animals in New York City at the time had both a red and blue copy of the FFP card. This was a good thing, as it is doubtful that the red card would ever have been played. Today, the blue FFP cards have been withdrawn, as criminal prosecution has been brought back to being solely a government responsibility (red card).

As a present-day example of a blue card (strong legal right), consider a state law that allows private citizens or organizations to file civil actions for the benefit of animals. Existing criminal law anti-cruelty provisions can constitute the standards for such civil cases. A North Carolina statute allows civil enforcement of anti-cruelty provisions.<sup>50</sup> The case of *ALDF v. Woodley* is representative of this type of action.<sup>51</sup> The Animal Legal Defense Fund (ALDF) filed suit to remove more than 300 dogs from the defendants' home

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47. This disparity of legal rights arises more from the reality that the cats have high social visibility with humans and therefore more political capital, rather than from any inherent value cats may have over chickens.

48. Section 8 of the 1867 New York anti-cruelty law stated:

Any agent of the American [S]ociety for the [P]revention of [C]ruelty to [A]nimals, upon being designated thereto by the sheriff of any county in this state, may, within such county, make arrests, and bring before any court or magistrate thereof having jurisdiction, offenders found violating the provisions of this act; and all fines imposed and collected in any such county, under the provisions of this act, shall inure to said society, in aid of the benevolent objects for which it was incorporated.

Act of Apr. 12, 1867, ch. 375, § 8, 1867 N.Y. Laws 87 (current version at N.Y. AGRIC. & MKTS. § 371 (Consol. 2004)). Thus, the ASPCA had the power to arrest, prosecute, and receive any fines imposed—an amazing exercise of legal power by one private group.

49. In 1889, the ASPCA prosecuted 949 cases in the courts. ASPCA, *supra* note 19, at 17.

50. N.C. GEN. STAT. ANN. § 19A-2 (West 2007) (“It shall be the purpose of this Article to provide a civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are available . . .”). This statute is discussed in detail in a law review article, William A. Reppy Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39 (2005).

51. *Animal Legal Defense Fund v. Woodley*, 640 S.E.2d 777 (N.C. Ct. App. 2007).

because of the adverse conditions in which the animals were living.<sup>52</sup> The court ordered all the animals removed from the Woodleys' home and title was transferred to ALDF, which found homes for almost all the animals. ALDF's trial court win was upheld on appeal.<sup>53</sup> After the civil case was filed, criminal charges were also filed against the owners on behalf of some of the animals (using these animals' red cards) and the defendants were found guilty in the criminal case. Without the blue card having been played first by ALDF, along with its attendant publicity, it is doubtful that the government would have played the red card on behalf of the animals. A second civil suit against a different defendant was filed by ALDF in 2007, and before the court ruled on the merits, the parties reached a settlement that provided appropriate care for the animals.<sup>54</sup>

The North Carolina statute is an excellent example of a strong legal right that is both conceptually important and powerful. As in *Woodley*, the court's factual inquiry and the core of its decision will focus not on the plaintiff human organization, but on the animals in question. Using a modest number of words in one section of a statute, the state can bring to bear a new set of resources for the benefit of the animals. As the plaintiff organization will receive no financial benefit for bringing the case, the exercise of the power

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52. The court stated the facts as such:

On 23 December 2004, [the] plaintiff filed a complaint against the defendants seeking preliminary and permanent injunctions under North Carolina's Civil Remedy for Protection of Animals statute[, N.C. GEN. STAT. ANN. § 19A-1]. [The] plaintiff alleged that [the] defendants had abused and neglected a large number of dogs (as well as some birds) in [the defendants'] possession.

*Id.* at 777–78. In this case, the defendants, Barbara and Robert Woodley, appealed from an injunction forfeiting all their rights in the animals and an order granting temporary custody of the animals to the plaintiff, the Animal Legal Defense Fund. *Id.* at 777.

53. On appeal, the defendants argued that Section 19A is unconstitutional in that it purports to grant standing to persons who have suffered no injury, and that it violates Article IV, Section 13 of the N.C. Constitution by granting standing through a statute. The court held that “Article IV, Section 13 . . . merely ‘abolished the distinction between actions at law and suits in equity’ . . . rather than placing limitations on the legislature’s ability to create actions by statute,” contrary to the defendants’ interpretation. *Id.* at 779 (quoting *Reynolds v. Reynolds*, 182 S.E. 341, 369 (N.C. 1935)).

54. See Pleadings, *Animal Legal Defense Fund v. Conyers*, No. 07CVD17739 (N.C. Dist. Ct. 2007), available at <http://www.animallaw.info/pleadings/pbusnconyers.htm>. “[The plaintiffs sought] preliminary and permanent injunctions pursuant to [N.C. GEN. STAT. §§ 19A-1 to -4] against [the d]efendant Janie Conyers, who was found to have 106 animals living in her house under deplorable conditions.” *Id.* “Most of the animals suffer[ed] from severe chronic oral and skin conditions due to neglect.” *Id.* “[The] [p]laintiff[] also moved for an order pursuant to [N.C. GEN. STAT. § 19A-4] terminating all possessory interests in the animals seized and awarding custody and possessory rights to the ALDF.” *Id.* See Press Release, Animal Legal Defense Fund, Animal Legal Defense Fund Sues to Rescue 100+ Dogs From Real-Life House of Horrors in Raleigh (Oct. 31, 2007), <http://www.aldf.org/article.php?id=468>.

will occur only when private individuals are willing to invest resources to help animals. Indeed, the *Woodley* case cited above cost ALDF significant amounts of money, both in attorney's fees and housing costs for hundreds of animals during the months the case wound its way through the courts. Finally, the statute is powerful as the inquiry is specifically focused on the conditions of the animals and on who should have ownership and responsibility for them. The remedy is focused on protecting the interests of the animals in question. It is doubtful that the local government had the resources to take on a case involving such a large number of animals, even if it had the will to do so. For the immediate future, this is the strongest and quickest path for the realization of animal rights in our legal system.

### 3. Green Cards—Preferred Legal Rights

Preferred legal rights exist when the animal or animals in question are the plaintiffs of the suit. In the above example, with only a small modification of the statute, North Carolina could allow enforcement by the animals themselves. The language "or domestic animal" could easily be added to the authorizing section. If the state did so, the domestic animals of the state would receive a green card right to add to the existing red and blue cards and the statute would represent a preferred legal right for animals.

As animals are not able to initiate a lawsuit personally or understand legal proceedings generally, the first step in the application of a preferred legal right will be the appointment of a legal guardian who can represent the animal or animals in the legal arena. This is not conceptually impossible and in fact has already occurred several times within the United States. A chimpanzee has had a guardian appointed for purposes of the animal's interests in a trust,<sup>55</sup> a dog has had a guardian appointed for purposes of placement,<sup>56</sup> and the fifty Michael Vick pit bulls were placed under the guardianship of an attorney.<sup>57</sup>

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55. Order Appointing Guardian ad Litem, *In re* Fla. Chimpanzee Care Trust, No. CP-02-1333-IY (Prob. Div. Palm Beach County Cir. Ct., Apr. 1, 2002) (on file with author) ("It is hereby ordered: 1. C.S. is appointed as guardian ad litem to represent the interests of the beneficiaries of the Trust in all future matters involving the Trust; and 2. C.S.'s reasonable fees for serving as guardian ad litem for the Trust beneficiaries shall be paid from the assets of the trust.").

56. Order Appointing Guardian ad Litem, *In re* Estate of Ronald W. Callan Jr., No. D-2252 (Shelby County Prob. Ct., Mar. 20, 2007) (on file with author) ("It is therefore Ordered Adjudged and Decreed that: 2. The Guardian Ad Litem owes a duty to this Honorable Court to impartially investigate and to determine the facts to the Court. The Guardian Ad Litem is not an advocate for the dog, but has the duty to determine what is best for the dog's welfare.").

57. Second Order as to Disposition and Appointing Guardian/Special Master at 2, *United States v. Approximately 53 Pit Bull Dogs*, No. 3:07CV397 (E.D. Va. Oct. 15, 2007), available at [http://www.animallaw.info/pleadings/pb\\_pdf/pbusvick\\_order\\_appointing\\_guardian.pdf](http://www.animallaw.info/pleadings/pb_pdf/pbusvick_order_appointing_guardian.pdf) ("1. Rebecca J. Huss is hereby appointed as guardian/special master to consider appropriate options for a final disposition of the remaining 48 pitbull dogs previously forfeited to the United States. 2. Professor Huss shall have the following powers and duties to fulfill her obligations: (a) Consider available



The threshold for appointment of a guardian is dependent on state law, but generally is allowed for children if (1) there is a prima facie showing of need within the legal system and (2) the party asking for the guardianship is capable of representing the child.<sup>58</sup> To expand the present system to include animals on a limited basis would not be difficult. This is primarily a procedural issue that is well within the existing capacity of our court system.

Examples of green cards are more limited. The primary example deals with human-created trusts for the care of animals, usually pets. The drafters of the Uniform Trust Code addressed this issue in the late 1990s with the drafting of Section 408 of the Model Law. Under this section, a trust for the care of an animal is specifically allowed, along with the authorization for courts to appoint someone to enforce the trust.<sup>59</sup> Parallel language has also been made part of the Uniform Probate Code.<sup>60</sup> Thus, a pet has become a legally relevant being, one who has equitable title in the income and assets of a trust. This is a limited legal personhood, but it goes beyond animal welfare concerns to actually provide a legal right for animals. The result of these

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disposition and placement options as she deems appropriate for the final disposition of the remaining dogs[.]”); Motion for Second Order as to Disposition and Appointing Guardian/Special Master, *Approximately 53 Pit Bull Dogs*, No. 3:07CV397, available at [http://www.animallaw.info/pleadings/pb\\_pdf/pbusvick\\_motion\\_to\\_appoint\\_guardian.pdf](http://www.animallaw.info/pleadings/pb_pdf/pbusvick_motion_to_appoint_guardian.pdf).

58. For examples of statutes providing for appointments of guardians for children, see ALASKA STAT. § 13.26.055 (2008) (“The court may appoint as guardian any adult whose appointment would be in the best interests of the minor . . . .”); WIS. STAT. § 48.977 (2007–2008) (appointment is allowed when a child is judged to be “in need of protection or services”); MICH. COMP. LAWS ANN. § 700.5212 (West 2009) (“The court may appoint as guardian a person whose appointment serves the minor’s welfare . . . .”). See generally Peter Mosanyi, Comment, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. LAW. 253 (2002).

59. UNIF. TRUST CODE § 408 (amended 2005).

(a) A trust may be created to provide for the care of an animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

*Id.*

60. See, e.g., ARIZ. REV. STAT. ANN. § 14-2907 (2005 & Supp. 2009).

[A] trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor’s intent.

*Id.*

provisions is that the animal is the beneficiary of the trust, and if issues arise, the trustee could be sued by the animal, through a court-appointed attorney, to enforce the provisions of the trust.

*C. Playing Your Hand—The Balancing of Interests*

As in most card games, to play a card does not mean that you will win the hand. That depends on the cards held by the other players. If an animal control officer has to use force to capture a dog, thus inflicting pain, the government may play the dog's FFP card. In turn, the animal control officer may play his "use of reasonable force" card that he received when he took on the job of dogcatcher. A jury will decide which card is stronger under the criminal law standard of proof beyond a reasonable doubt.<sup>61</sup> If the same force was used by a neighbor, the dog's card will win, unless the human could play the "self-defense" card.

If a young man decides he wants to smell burning flesh and therefore sets his neighbor's dog on fire, the government can play the animal's red FFP card in every state and will most likely win the hand, as the young man holds no cards justifying such action. (His particular interest, to smell burning flesh, is not judged by society to be appropriate if the animal is alive, and may indeed be an interest judged adverse to other social values.) Note that this is a different card than the dog owner's property ownership cards, which might be played against the young man in a civil action to collect for damages to his property. However, if a researcher at Big University decides to burn the skin of a dog in order to do research on the recovery process of burned skin, the outcome will likely be very different. If the government seeks to play the FFP card here, the researcher has a powerful "go free" card because of the outright exemption for infliction of pain in scientific research. It is not even a matter of seeing which card has more value: at the present time the researcher's card simply trumps the animal's FFP card, regardless of the value of the dog's

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61. *State v. Wrobel*, 207 A.2d 280 (Conn. Cir. Ct. 1964). The dog warden of East Hartford had been found guilty of cruelty to animals because of the violence he used as he rounded up dogs to take to the shelter. *Id.* at 282. In overturning the dog warden's conviction, the appellate court said that:

What is cruelty under one set of circumstances may not be cruelty in another. The issue of justification, we believe, was treated too abruptly. It was left to the jury to determine whether the defendant was justified in doing what he did. Further, explication, it appears, was needed, pointing to the extent and limits of the defendant's duty and authority as dog warden: that in performing his duty he may not only resort to force, beating, injuring or killing a roaming dog but may be required to do so; that the application of such force, although it may appear to be cruel to bystanders, who are under no responsibility to act, may be the practicable and reasonable means to accomplish the capture and impounding of the offending dog, and therefore not within the statutory meaning of cruelty.

*Id.* at 284-85.

card.

A 2008 Supreme Court case, *Winter v. NRDC*,<sup>62</sup> provides an excellent example of a blue card legal balancing process between the interests of a set of animals and society's interest in military preparedness. In this case, the plaintiffs had obtained a preliminary injunction to stop the Navy from using high levels of sonar signals during open ocean training because of the risk of harm to whales and other mammals who are particularly sensitive to that range of sound.<sup>63</sup> Under the National Environmental Policy Act (NEPA), and the requirement that government agencies do an Environmental Impact Statement (EIS) before engaging in particular projects or actions,<sup>64</sup> the possibility of injury or death to groups of animals must be considered before the action is taken. This is a weak blue card held by the whales and dolphins. Under NEPA, citizen suits may be filed to assert the blue card of the animals in question, and in this case, the NRDC and others chose to do so.<sup>65</sup> At the lower level, the courts gave sufficient weight to the blue card of the whales to support a preliminary injunction, telling the Navy it could not proceed with the training exercise until the plaintiffs' claim about the lack of an EIS by the Navy could be heard by the courts.<sup>66</sup>

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62. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

63. Admittedly, these animals are not human property. But wildlife shares the same interests in being free from pain and suffering as domestic animals. The author is presently drafting an article to address the issue of legal rights for wildlife.

64. As described by the Court:

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies "to the fullest extent possible" to prepare an environmental impact statement (EIS) for "every . . . major Federal actio[n] significantly affecting the quality of the human environment." An agency is not required to prepare a full EIS if it determines—based on a shorter environmental assessment (EA)—that the proposed action will not have a significant impact on the environment.

*Winter*, 129 S. Ct. at 372 (internal citations omitted) (alteration in original).

65. The Supreme Court explained the plaintiffs' allegations of harm as follows:

They contend that MFA sonar can cause much more serious injuries to marine mammals than the Navy acknowledges, including permanent hearing loss, decompression sickness, and major behavioral disruptions. According to the plaintiffs, several mass strandings of marine mammals (outside of SOCAL) have been "associated" with the use of active sonar. They argue that certain species of marine mammals—such as beaked whales—are uniquely susceptible to injury from active sonar; these injuries would not necessarily be detected by the Navy, given that beaked whales are "very deep divers" that spend little time at the surface.

*Id.* at 371.

66. As stated by the Supreme Court:

The Court of Appeals further determined that plaintiffs had carried their burden of establishing a "possibility" of irreparable injury. Even under the Navy's own figures, the court concluded, the training exercises would cause

The Supreme Court reversed this position, striking the injunction and telling the Navy it could proceed with the training, without concern for the whales or dolphins. The weighing process was clearly stated by the majority:

While we do not question the seriousness of these interests, we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy. For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President—the Commander in Chief—has determined that training with active sonar is “essential to national security.”<sup>67</sup>

Thus, the animals had an interest worthy of considering, but the weight of their interests was not sufficient to overcome the military need of the state.<sup>68</sup> Two of the Justices<sup>69</sup> and others would have struck a different balance.<sup>70</sup> Note that the Supreme Court did not suggest what units of measurement should be used to do this balancing of interests, yet it seemed very sure of the ultimate weight assigned to each side. This is reflective of the difficulty in predicting the outcome of any particular conflict involving animal interests. It is often difficult to predict in advance just how a court will weigh either the interests of the animals in question or the value of the human enterprise that is at issue.

As the above suggests, animals presently have modest levels of legal rights in our system. These rights arise out of the factual reality that they, as

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564 physical injuries to marine mammals, as well as 170,000 disturbances of marine mammals' behavior. Lastly, the Court of Appeals held that the balance of hardships and consideration of the public interest weighed in favor of the plaintiffs.

*Id.* at 374 (internal citation omitted).

67. *Id.* at 378.

68. The Court had to speak in terms of the plaintiffs' interest, as they have standing under NEPA, while the whales do not. *Id.* at 378. While it is certainly true that under our concepts of standing, humans have a cognizable interest in watching whales, the plaintiffs are also surrogates for the interests of the whales. The *Lujan*-based “harm” of the humans in this case opened the door for the Court to consider the real physical harm that the whales themselves would undergo when subjected to high-intensity bursts of sonar. *Id.* at 377–78.

69. Justices Ginsburg and Souter dissented. *Id.* at 387. Justice Ginsburg wrote: “I would hold that, in imposing manageable measures to mitigate harm until completion of the EIS, the District Court conscientiously balanced the equities and did not abuse its discretion.” *Id.* (Ginsburg, J., dissenting).

70. Editorial, *Sonar over Whales*, N.Y. TIMES, Nov. 15, 2008, at A20.

living beings, have interests. This is what separates animals from other personal property. They have and can hold cards in The Rights Game. Previous writers have not considered this reality in a systematic way. The following is offered to help bring some structure to the consideration of what legal rights might and should be granted to animals.

#### IV. LEGAL CHARACTERISTICS OF LIVING PROPERTY

As mentioned initially, this analysis assumes that animals will remain in some form of property status. This is not to suggest that wild animals do not deserve or are somehow not capable of holding legal rights.<sup>71</sup> Under states' anti-cruelty statutes, the protections provided animals do not depend upon their status of being wild or domestic. However, this Article addresses only domestic animals and leaves for another day an article about legal rights for animals outside the realm of property law.

In the following, the word "ownership" will be used to describe the general relationship between humans and owned animals. This word is offensive to a number of individuals who believe the use of the word implies an attitude suggesting a superior human status with total control over the animal. Some suggest the term "guardian" be used instead.<sup>72</sup> But, the concept of ownership as applied to an animal can be either beneficial, as when the relationship is respectful, or detrimental, when the relationship is oppressive. For this Article, the traditional word will be used in a more neutral and limited connotation. The owner of an animal is that human, or entity, who has responsibility for the animal in the context of the limited human and animal rights that will be set out below. Now we turn to consideration of the new, fourth category of property, living property.

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71. More than a generation ago, one article argued for the legal rights of whales. Sudhir K. Chopra, *Whales: Toward a Developing Right of Survival as Part of an Ecosystem*, 17 DENV. J. INT'L L. & POL'Y 255 (1989). As discussed in *supra* notes 62–69, the U.S. Supreme Court weighed the interests of whales to be free from the negative effects of sonar. Additionally, the Great Ape Protection Project, or Project GAP, seeks to establish legal rights for the great apes. See Project GAP: World Declaration on Great Primates, <http://www.greatapeproject.org/en-US/oprojetogap/Declaracao/declaracao-mundial-dos-grandes-primatas> (last visited June 15, 2010). See also Lee P. Breckenridge, *Can Fish Own Water?: Envisioning Nonhuman Property in Ecosystems*, 20 J. LAND USE & ENVT'L. L. 293 (2005) (discussing the need to modify property law concepts in the face of the complexities of managing nature resource ecology).

72. This movement for change has realized some success with the change of terms to "guardian" occurring in twenty cities and the State of Rhode Island. Diane Sullivan & Holly Vietzke, *An Animal Is Not an iPod*, 4 J. ANIMAL L. 41, 44–45 (2008).

*A. Who Is Within This New Category? A Sweeping Definition  
Thereafter Limited*

1. Living Beings

There have been a number of attempts to define the relevant group of animals for purposes of ethical or legal discussion. Most attempts at definitions are on a comparative basis relative to human characteristics. For example, it might be argued that legal rights should be extended to those animals who are conscious, self-aware, have language, use tools, or feel pain.<sup>73</sup> This author seeks a different, more fundamental, starting point of analysis. There is a more compelling characteristic common to all, that of being alive. Moral and ethical concerns should start with all beings who have self-interests, meaning those who are driven to live a life by the encoding of their DNA. The various species-specific capacities, such as consciousness or self-awareness, of groups of animals will be important for deciding which rights an animal might deserve. However, consideration of capacities is not necessary for initial consideration of admission into the new category of living property. Thus the word “living” is initially as broad as the surface of the Earth.

The first limitation on the scope of the phrase living property is of course the word property. Beings must be a human’s property to be within the relevant group. That is, they have to be knowingly possessed by a human (or human substitute such as a city or corporation) with an intention to exclude others. That a living being lives upon or crosses over the real property of a human does not constitute possession of that living being for this purpose. Wild beings within natural ecosystems are not personal property. While governments assert the right to control access to wild animals, they do not have possessory rights or ownership of wild animals.<sup>74</sup> The state does not possess these animals, and has little control over them and little responsibility for their well-being, at least at the present. While wild animals have many of the same sorts of interests as domestic animals and therefore a basis for legal rights, the legal context for acknowledging them will require a different analysis than is provided in this Article. For example, the concepts of living space and duty of care have to be different when the animals are not possessed by humans.

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73. See DAVID S. FAVRE, *ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS* 406–19 (2008). New information suggests that magpies may join the elite list of self-aware animals, as they recently showed self-recognition while looking in mirrors. Bruce Bower, *Magpies Check Themselves Out: Reactions to Mirror Image Suggest Self-Recognition*, SCI. NEWS, Sept. 13, 2008, at 10.

74. See generally FAVRE & BORCHELT, *supra* note 18, at 36–43.

## 2. Practical Limitations

Now there must be excluded from our consideration a large set of living beings for practical purposes. For the time being, the plant kingdom must be set aside in the consideration of legal rights. Plants certainly are living beings, but we simply do not know how to think about plants at this point in time.<sup>75</sup> They do not have a central nervous system and do not seem to feel pain in the way that animals do. As a result, they do not trigger the bridge of compassion that exists with animals, with whom we share the experience of pain. Humans certainly do own plants, use them, possess them, create new ones, and kill them on a regular basis, both intentionally and unintentionally. But the world is complex enough when just dealing with animals and resources are limited in both the political and legal worlds. Most humans have just not given sufficient thought to plants to propose general legal principles beyond that of protection of plants as endangered species.<sup>76</sup> However, some initial thoughts about plants and human ethical duties have been pursued by a Swiss committee.<sup>77</sup>

Even if we limit our consideration to animals, some additional limitations will be necessary. While most insects, worms, and other small animals are not the property of humans and therefore not part of this discussion, some

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75. In one of the earliest articles on this issue, one scholar suggested that plants, as part of an ecosystem, deserve special legal standing. See Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

76. This protection seems to arise more out of concern for saving the diversity of the ecosystem than ethical concern for the plants themselves. Under the U.S. Endangered Species Act, plants found to be either endangered or threatened receive protection from human destruction. 16 U.S.C. § 1538(a) (2006).

77. Consider the following:

In April of 2008, the Swiss Confederation convened the Federal Ethics Committee on Non-Human Biotechnology (ECNH) to ponder the issue of plants' rights. Philosophers, geneticists, lawyers and theologians came together to contemplate the "moral consideration of plants for their own sake." In citing the commonalities of plants and animals at the molecular and cellular levels, those assembled determined that plants have inherent worth and their own interests, [and] thus, deserve protection. The Committee ruled that plants, like other living organisms, should be considered as part of the "moral community," as they are living beings able to experience good and bad effects on their survival. Some panelists expressed the belief that plants actually have feelings. The philosophy of plant life devised by participants was published in a report entitled, "The Dignity of Living Beings With Regard to Plants: Moral Consideration of Plants for Their Own Sake."

Janet Levy, *People for the Ethical Treatment of Plants and Rivers*, AM. THINKER, Dec. 8, 2008, [http://www.americanthinker.com/2008/12/people\\_for\\_the\\_ethical\\_treatme.html](http://www.americanthinker.com/2008/12/people_for_the_ethical_treatme.html). For the Committee's report, see FED. ETHICS COMM. ON NON-HUMAN BIOTECH. (ECNH), THE DIGNITY OF LIVING BEINGS WITH REGARD TO PLANTS (2008), available at <http://www.ekah.admin.ch/fileadmin/ekah-dateien/dokumentation/publikationen/e-Broschure-Wurde-Pflanze-2008.pdf>.

humans choose to possess the most amazing array of animals. To keep the discussion focused upon those who have the most complex needs and for whom we can do the most, a further limitation will be useful. Many states initially defined protected animals with the full sweep of the biological definition of the word “animal,”<sup>78</sup> but the application of the definition, as reflected in the cases filed at the time, was mostly limited to mammals.<sup>79</sup> More recently, as violations of these laws have become felony violations, the legal definition of animal has been redrawn at the line of vertebrate animals.<sup>80</sup> Likewise, the following discussion of a new property status will be extended only to vertebrate animals. Non-vertebrate animals, who are the property of humans, will be governed by the traditional rules of property. Again, in the future this line could be redrawn. As science provides more information, the legislatures will have to adopt new provisions. This is not to suggest that invertebrate animals are not worthy of ethical concern, as they do have individual interests, even if they might sit more lightly on the scale of our moral concerns.

### 3. Individualism

Our legal system may grant rights or restrict benefits to large groups of individuals, but our primary legal dispute mechanisms presume that individuals will step forward before agencies or courts. These individuals have names that provide identification. The world of non-human animals contains some animals who have been given names and therefore can be uniquely identified, but many, if not most, are nameless property. For example, the pet dog may be Rough Smith, but the ten leghorn chickens in the backyard are nameless and indeed almost impossible to uniquely identify with the human eye.

For an animal to have a human-designated name suggests a level of human concern, recognition, and interaction which separates that animal from the unnamed living property. These animals may be easier to consider within the legal system (politically and practically). Categories of named property,

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78. See, e.g., CAL. PENAL CODE § 599b (West 1999 & Supp. 2010), (the phrase “every dumb creature” was added to the Code in 1905); MISS. CODE ANN. § 97-41-1 (1930) (based on New York’s 1867 law and featuring the phrase “[a]ny living creature”), *invalidated* by *Davis v. State*, 806 So. 2d 1098 (Miss. 2001); and MINN. STAT. § 343.20(2) (2009) (the phrase “every living creature except members of the human race” was added sometime before 1900).

79. For example, ASPCA gives a list of cases filed and the vast majority deal with horses and dogs, but a duck and turkey case was also reported. See ASPCA, *supra* note 19, at table of contents.

80. See, e.g., VA. CODE ANN. § 3.2-6500 (2008) (substantial revisions of the state’s cruelty laws in the 1990s included adding the phrase “any nonhuman vertebrate species except fish”); see also MICH. COMP. LAWS ANN. § 750.50(1)(b) (West Supp. 2009) (defining animals as “any vertebrate other than a human being”).



e.g., pets, may receive some legal rights before other categories, e.g., laboratory animals. Remember, progress will be piecemeal.

As a brief aside, the naming of individual animals who are not human property may be an effective mechanism by which specific animals could be granted access to legal personhood.<sup>81</sup> Tigers in India are being given identification cards.<sup>82</sup> The chimpanzees named by Jane Goodall<sup>83</sup> or the named, identifiable mountain gorillas of Rwanda have the individuality that humans are comfortable with and that could be acknowledged within a legal system.<sup>84</sup>

The remaining difficulty is how to identify potential plaintiff animals who are nameless. Dispute resolution and assertion of legal rights are often heavily fact-dependent. Therefore, dispute resolution should be limited in the legal world to instances in which the facts for groups of living property are, first, discoverable, and second, approximately the same in a given fact pattern. This can be accomplished by group identification. For example, the pigs on the Jones Farm or the bison on the Flying K Ranch may be considered a group for the protection of the law and allowed to assert legal rights through human owners. This presumes that the nature of the right asserted and the remedy sought does not require consideration of specific individuals.<sup>85</sup>

In summary, the term living property shall refer to vertebrate animals who are property and shall be identified by either specific name or by group reference.

### *B. What Are Animal Interests?*

#### *1. Identification of Interests*

The creation of this new category of property is based upon the reality that these beings, like human beings, have individual interests worthy of our consideration, both within the world of personal morals and ethics and the

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81. For an insightful discussion of the consequence of seeing animals as individuals, see Joseph Vining, *The Mystery of the Individual in Modern Law*, 52 VILL. L. REV. 1 (2007).

82. In January 2008, it was announced that the tigers of India would be given individual identification cards. See Apinya Wipatayotin, *Tigers Get Own ID Cards*, BANGKOK POST (Thail.), Jan. 16, 2009, available at <http://www.bangkokpost.com/news/local/9807/tigers-get-own-id-cards>.

83. JANE GOODALL, *THE CHIMPANZEES OF GOMBE: PATTERNS OF BEHAVIOR* (1986).

84. There are eighteen family groups of mountain gorillas that have been studied to the point that they are readily identifiable by their “noseprints,” as opposed to human fingerprints. The International Gorilla Conservation Programme has information pertaining to these gorillas, as well as family albums showing the pictures of seven readily identifiable mountain gorilla families of Rwanda. The pictures show each gorilla along with its name. See International Gorilla Conservation Programme, Mountain Gorillas, [http://www.igcp.org/gorillas/gorillas\\_mountain.htm](http://www.igcp.org/gorillas/gorillas_mountain.htm) (last visited June 15, 2010).

85. This analysis parallels that done for organizational standing. For a general discussion of human standing in the traditional animal law context, see FAVRE, *supra* note 73, at ch. 9.

world of law. It is therefore important to consider in more detail just what is contemplated by the concept of “interests.”

As a starting point, some of the behaviors that most, but not necessarily all, animals engage in and that demonstrate the scope of their interests include:

- fighting for continued life,
- finding and consuming food daily,
- socializing with others (usually of the same species),
- mating,
- caring for their young,
- sleeping,
- accessing sunlight (or not),
- exercising their inherent mental capacities, and
- moving about in their physical environment.

Roscoe Pound starts his five-volume analysis of jurisprudence with the proposition that human interests exist and that the resolution of conflicting or competing interests is a primary function of the legal system.<sup>86</sup> This Article urges the same approach for non-human animals. The concept of animal interests needs to be considered in relation to three fundamental questions: Do animals have interests? (This is definitional.) Can humans be confident enough about understanding these interests to articulate them within the legal system? (This is a matter of science.) And finally, do they deserve to be acknowledged within the legal system? (This implicates moral beliefs in a political system.)

That living property has interests is not a matter of philosophy or debate, it is a matter of fact that is derived from the existence and nature of the DNA<sup>87</sup> that creates each individual being on Earth (pardon this brief foray into the realm of science). Inherent in the nature of the DNA molecule is that it self-

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86. See 3 POUND, *supra* note 9, at 17.

Conflicts or competition between interests arise because of the competition of individuals with each other, the competition of groups or associations or societies of men with each other, and the competition of individuals with such groups or associations or societies in the endeavor to satisfy human claims and wants and desires.

*Id.*

87. For this Article, the consequences of DNA are the starting point of analysis. Where DNA came from or how it evolved is not necessary to discuss. A discussion of the nature of DNA is fundamental to any course on biology, and therefore part of many textbooks. See, e.g., CHRIS R. CALLADINE & HORACE R. DREW, UNDERSTANDING DNA: THE MOLECULE & HOW IT WORKS (3d ed. 2004); KARL DRLICA, UNDERSTANDING DNA AND GENE CLONING: A GUIDE FOR THE CURIOUS (4th ed. 2004).

replicates. The DNA that is found in living beings are special groups of self-replicating molecules that have evolved into increasingly complex packages that help assure the replication of the next generation of DNA molecules.<sup>88</sup> The packages protect the DNA from environmental harm, seek out optimal conditions for creating the next generation, and may actually shelter and support the next generation of DNA until they have the best chance to survive on their own. Some packages learned to breathe oxygen, others learned to run toward or away from other packages. Some can see the world with color; others can smell the world around them. Many DNA packages have developed the capacity to feel pain and some have a capacity for self-awareness or consciousness. These specific packages of DNA, which we see as the animals around us, have evolved over the millions of years under the rules of natural selection. Rocks and cars have no DNA, do not have a capacity to self-replicate, and therefore, have no interests deserving our attention.

DNA beings have the molecular desire to replicate and this requires them to live, to fight to live, and perhaps to kill other DNA beings in order to live. To say that a living being has interests is to simply acknowledge that each individual has been endowed by their DNA with a package of skills and capabilities that we expect the individual to exercise in pursuing his or her life. A primary interest of a bat is to be in darkness during the day, while the turtle will seek out the sun to raise his body temperature and become fully functional. Having evolved within the family of mammals, it is easy to see how some of our primary interests or skills are shared with other mammals. For example, the desire of a mother to care for her young is shared with most mammals, be they sheep, whales, or rabbits.

The examples set out above are, of course, just suggestive of what is important to beings. To the extent that we are comfortable in describing and protecting the interests of humans, we should also be comfortable in understanding at least the basic interests of mammals, and perhaps other animals. Our scientific knowledge of other beings seems to grow exponentially each decade. It is not critical to know all the interests of all animals before we proceed to acknowledge the critical interests of some of the

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88. See RICHARD DAWKINS, *THE SELFISH GENE* 23 (1976).

We are survival machines, but 'we' does not mean just people. It embraces all animals, plants, bacteria, and viruses. . . . We are all survival machines for the same kind of replicator—molecules called DNA—but there are many different ways of making a living in the world, and the replicators have built a vast range of machines to exploit them.

*Id.* at 22.

animals.<sup>89</sup> Change in the legal system is inherently incremental, in part because information comes to us incrementally. As suggested above, our society has indeed already started down that path; it is now time to acknowledge the reality and to deal with the issues in a more systemic way.

There is one interest that others suggest is a paramount interest of animals and that is not on the list above—that of liberty of movement. Assuming that liberty for animals is defined as the ability to self-direct individual movement without the restraint of humans or their fences, then clearly this interest is not possible in the world of living property, where possession is critical and restraint is presumed.<sup>90</sup> Nor would it be proper to consider children to have a right of liberty. However, it can be suggested that wildlife do possess a right of personal liberty so long as they can exist in their natural habitat.

The personal observations of this author suggest that while providing a livable space is important to an animal, full liberty of movement is not. Consider sheep. The author of this Article has had the privilege of helping raise Icelandic sheep for more than five years. The sheep like to be with other sheep, they like to wander to look for food. Without fences, they would

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89. For example, there has been a tentative recognition of the interests of our genetic cousins, the chimpanzee, in continued life:

In 2000, Congress passed the Chimpanzee Health Improvement, Maintenance, and Protection Act. The issue before Congress was what should be done for or with the more than one thousand long-living chimpanzees that had been part of the U.S. federal research system for many years, but were no longer needed for research. A special committee of the National Research Council looked into the issue and found that continued lab housing for chimpanzees would have been expensive, particularly when the animal was no longer actively part of research. The cheapest alternative would have been to euthanize the unneeded animals, though this option was rejected by the Committee, and ultimately by Congress as well. The option suggested by the Research Committee and adopted by Congress was the creation of retirement sanctuaries that would be operated and partly supported by Congress and non-profit private organizations.

David S. Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333, 348 (2005) (citing Pub. L. No. 106-551, 114 Stat. 2752 (codified at 42 U.S.C. § 287a-3a (2006))). See also CHIMPANZEE HEALTH IMPROVEMENT, MAINTENANCE, AND PROTECTION ACT, S. REP. NO. 106-494, at 3 (2000) (“The CHIMP Act is designed to provide a cost-effective and humane solution to the problem of surplus chimpanzees in research.”). By early 2010, while more than 1,100 chimps remained in research facilities, more than 100 were retired at Chimp Haven. See Chimp Haven: Our History, <http://www.chimphaven.org/about-history.cfm> (last visited June 15, 2010).

90. This discussion distinguishes the need of living beings for living space from the concept of liberty for the individual. Requirements of personal liberty are not part of the realm of living property. One path to animal rights suggested by others would be a legal action based upon habeas corpus. Thus, a zoo or research laboratory might be sued in the name of a possessed chimpanzee to free her from a place as a legal person with personal liberty. Under the principles of this Article, the chimpanzee could not complain about the fact of ownership and therefore possession, but could well complain that her interests in appropriate living conditions (space) have been violated.

undoubtedly go off our land to see what is in the next field. But if they do so, I cannot protect them from the risk of the broader world and I cannot protect the rest of the world from the risk of a 220-pound ram. After a number of years of observation, I believe that the vast majority of their interests can be fully realized within our fences and that their inability to wander at will is fully offset by the protection they receive from negative consequences to themselves and others arising out of unrestrained movement. This does not mean that it would be appropriate to keep them in a five-by-five-foot pen in the barn, as this would frustrate most of their other interests and their quality of life.<sup>91</sup>

## 2. Which Interests?

Having established that animals have interests and that some animal interests can and have previously been acknowledged in the legal system, a remaining question to consider is, Which additional interests ought to be protected within the legal system?<sup>92</sup> The quick answer to this question is, Those interests that can garner sufficient political support for the passage of new laws. The likelihood is that different species will have different sets of interests acknowledged within the legal system. Again, this will be the result of the political reality of incremental legal change.<sup>93</sup>

As with humans, not all animal interests will deserve the attention of the legal system.<sup>94</sup> For example, humans have an interest in receiving correct, true information. Therefore, it is generally considered a wrong to make a false statement to another human (false statements to pets may not fall under

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91. Likewise, to give the author's dogs, 100-pound Great Pyrenees, total personal liberty would put the dogs, cars, and others at risk. Again, it is a judgment matter, as the benefit of their total freedom does not seem to be as important as the protections of restraints for the realization of other interests, such as freedom from pain and suffering. Cats, of course, are another matter. Cats often have full liberty, but the negative risk of liberty to them and to others is much less than with dogs or sheep. Other cat owners weigh the balance of protection versus freedom differently. Perhaps the risk of harm to other small animals such as mice and birds weighs heavily in the balance, restricting the cat's liberty.

92. In the first part of the CRIBBET & JOHNSON hornbook on property law, the authors start with an animal reference. They begin by acknowledging that a dog has a possessory interest in certain personal property, such as a bone, to which other animals and even humans must give a certain amount of respect. But, as they point out, the protection of the bone by brute force and cunning does not rise to a property right; that is, the law does not at the moment acknowledge the dog's interest in possessing the bone. See JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 4 (3d ed. 1989). But, there is no conceptual reason it could not.

93. Compare the retirement system contemplated by federal law for chimpanzees, Favre, *supra* note 89, with the status of rats or mice also used in experiments. Not only do the rats not have a retirement system, but they are specifically excluded from the protection of the Animal Welfare Act. 7 U.S.C. § 2132(g) (2006).

94. For an example of the parallel nature of human interest and that of a human's pet and how they could result in parallel legal rights in the world of torts, see FAVRE, *supra* note 73, at 327.

this proposition). While all mothers have an interest in not being lied to by their children, it is not illegal to lie to your mother. Imagine the clogging of the courts if such was the law and imagine the difficulty of determining just what the truth might be. How could the damages flowing from the false statement to your mother be calculated, and what remedies could be provided? However, when it comes to lying in the context of providing information the government needs, laws have been adopted. It is illegal to lie on your tax return,<sup>95</sup> and it is perjury to lie in a court proceeding.<sup>96</sup> Thus, as it is that not all human interests are within the legal system, so it will be with animal interests. Dogs may have an interest in getting treats every day, but that does not seem fundamental to a dog's well-being and therefore will not rise to the level of a legal right.

As an example of how new information creates a political re-weighing of conflicting interests, consider the issue of smoking cigarettes. Some humans have a high interest in smoking cigarettes, others have a high interest in not being subjected to inhaling cigarette smoke. Initially, the freedom of individual action outweighed the complaints about breathing the smoke of others. This conflict was brought into the legal system only after there were scientific facts that suggested the harm of cigarette smoke to others.<sup>97</sup> Increasingly over time, legislatures have given more weight to those seeking to remain free from the risk than to the freedom of individuals to engage in risky conduct.<sup>98</sup> The law has imposed bans on smoking in many places.<sup>99</sup>

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95. 18 U.S.C. § 1001 (2006).

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years . . . or both.

*Id.*

96. 18 PA. CONS. STAT. ANN. § 4902 (West 1983); ARIZ. REV. STAT. ANN. § 13-2702 (2001); MISS. CODE. ANN. § 97-9-61 (2006); 18 U.S.C. § 1621 (2006).

97. See Amanda Bosky, Comment, *Ashes to Ashes: Secondhand Smoke Meets a Timely Death in Illinois*, 39 LOY. U. CHI. L.J. 847, 851 (2008) ("The main reason for the sharp downward turn in the prevalence of smoking is simple—knowledge."); see generally Robert A. Kagan & David Vogel, *The Politics of Smoking Regulation: Canada, France, the United States*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 22–48 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

98. Bosky, *supra* note 97, at 851–65.

99. See the timeline of events in Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in *REGULATING TOBACCO* 11, 17–19 (Robert L. Rabin &

However, the law has not made it illegal in an individual's home, as a greater public policy of non-interference in a person's residence has trumping power for this issue, for the time being.<sup>100</sup>

Choosing which animal interests the legal system should deal with is a judgment call.<sup>101</sup> The same matrix of questions has to be asked. Do we understand the interests in question (science information)? Is the interest in conflict with the interests of humans or the government? Can the legal system provide a useful remedy with the resources available? Do other public policies trump the animal's interests? As almost no human interest is absolute, neither shall any animal interests be absolute. The critical interest of dogs and cats to reproduce themselves has been significantly interfered with by laws mandating their sterilization because of the public policy concerns about pet overpopulation. On the other hand, a fair argument can be made that complex animals such as chimpanzees, who spend decades of their lives in single cages in laboratories, are experiencing such a significant interference with any quality of life that those conditions cannot be justified by any possible benefit to humans and therefore should be illegal.<sup>102</sup>

Allowing that some animal interests will be asserted within the legal system, it is now time to consider the outline of what this might mean within the world of property law.

#### V. INITIAL SCOPE FOR THE RULES OF LIVING PROPERTY

The basic principles of property law will be modified in three basic categories in order to provide legal protection for the interests of living property. First, the rights of owners will have to be limited to some degree to accommodate some of the interests that their property asserts against them. One area of particular impact will be the ability of owners to realize economic value from their animals. What you can do with lumps of coal will be different from what you can do with animals. Second, humans who are not animal owners will have new duties toward living property that they do not have toward non-living property. As juristic persons, remedies for tort wrongs inflicted upon animals will be able to run to the benefit of the illegally

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Stephen D. Sugarman eds., 2001).

100. New information pushes the legal and public policy debate forward. A 2009 report suggests there should be a new level of concern for smoking issues. See Roni Caryn Rabin, A New Cigarette Hazard: "Third-Hand Smoke," N.Y. Times on the Web (Jan. 3, 2009), [http://www.nytimes.com/2009/01/03/health/research/03smoke.html?\\_r=1&em](http://www.nytimes.com/2009/01/03/health/research/03smoke.html?_r=1&em).

101. For some discussion of quality of life for animals, see generally TEMPLE GRANDIN & CATHERINE JOHNSON, ANIMALS MAKE US HUMAN: CREATING THE BEST LIFE FOR ANIMALS (2009).

102. See David Favre, *Laboratory Animal Act: A Legislative Proposal*, 3 PACE ENVTL. L. REV. 123 (1986).

harmful animal. Finally, the living property will hold certain rights themselves.

There is no mathematical formula for deciding these questions. It is inherently a balancing of the interests of the animals with those of the humans. And given how intertwined the lives and products of animals are with humans, this is not an easy or abstract task. This balancing can and will occur at a number of locations within our legal system, including legislatures, administrative agencies, and courts. Deciding how much weight to give to an interest is a social and, therefore, political judgment. What can be expected is that the weight given to animal interests has and will continue to increase.

#### A. *Rights of Human Owners*

##### 1. Original Title

Animals enter the property system in two primary ways. First, they are removed from the wild by humans who kill or capture them.<sup>103</sup> Second, they are born to mothers who are already within the property system. Under the traditional common law rule, title to a wild animal is secured by obtaining possession of the animal.<sup>104</sup> The other traditional rule for animals is that ownership of a newborn will follow the ownership of the mother.<sup>105</sup> The creation of a living property category does not require a change in these rules, as the public policies supporting the rules are still relevant. They represent simple, enforceable rules that do not normally require a court's intervention.

In addition to the time-honored, natural way of sexual reproduction, today humans are able to manipulate DNA in an assortment of ways. First, there is the process of cloning which allows for non-sexual reproduction, by using just one set of DNA to create the next generation.<sup>106</sup> Ownership of these offspring

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103. It will be possible in the future to amend the rules of property so that certain categories of animals, such as primates and whales, are simply not available to be captured and become property. At the moment, the taking of some animals from the wild is limited under Endangered Species Act protections. To go another step further, primates and whales in their natural habitat could be declared legally incapable of becoming property by capture or killing, regardless of their endangered species status. Human laws can exclude species from the realm of property law.

104. The rule of *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805), shall remain as a base point of analysis. Chasing the fox is certainly not enough, dominion and control of the fox is the trigger awarding title to the fox or other wild animals. FAVRE & BORCHELT, *supra* note 18, at 26–27.

105. FAVRE & BORCHELT, *supra* note 18, at 25–26.

106. For a discussion of some of the policy concerns that arise with cloning, see Adrienne N. Calhoun Cash, *Invasion of the Clones: Animal Cloning and the Potential Implications on the Future of Human Cloning and Cloning Legislation in the United States, the United Kingdom and Internationally*, 82 U. DET. MERCY L. REV. 349 (2005). In the expensive world of cloning your pet dog (\$150,000 or more at one lab), it is a commercial enterprise where ownership of the new dog belongs to the person who provides the old dog's DNA and pays for the procedure. See Eric Konigsberg, *Beloved Pets Everlasting?*, N.Y. TIMES, Jan. 1, 2009, at D1.



will be in those humans who own the source of the DNA, unless modified by contract. The second major category is that of transgenic creation.<sup>107</sup> In this case, DNA from different sources or perhaps DNA sequences created by humans in a lab are joined together to create beings that did not exist before. Ownership of these beings will be awarded to the creator of the being. Assuming this new being is capable of sexual reproduction, the traditional rule of ownership following the mother will govern subsequent generations of the new being.

## 2. Transfer of Title

Assuming an animal is property, a key property right for the owner is the ability to transfer title to another. Under this topic are issues such as: How should title be transferred and are there any limits on who can hold the title of an animal? One underlying factor in the rules of property is that ownership rules often reflect the social desire for economic efficiency so that owners of property may best realize the economic value of their property. With the creation of the category of living property, non-economic values will play a more dominant role; in some circumstances, this will make economic efficiency less dominant in the rule making.

The primary methods of voluntary transfer of title for personal property are by sale, gift, or inheritance. Involuntary transfers of title include foreclosure on a lien, court order, and the government exercise of eminent domain. As a general rule, these methods will remain in place. To the extent that animal ownership is based upon the owner's desire to realize economic value, the right to sell (and the right to buy) an animal is a most important legal right, be it a racehorse or a chicken. To the extent that society wishes to give emphasis to other values that animals represent to society and individuals, the right to sell might be limited. For example, a law precluding the sale of cats could be passed.<sup>108</sup> Ownership transfer could be limited to gift, inheritance, and adoption (defined as a non-profit transfer of an animal with the individual or group facilitating the adoption seeking a good placement for the animal). This would eliminate the profit motive as a reason to keep cats and lessen the possibilities of the creation of economic breeding in adverse conditions (e.g., kitten mills). A number of organizations presently

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107. The GloFish may well have been the first commercial product of transgenic engineering. See GloFish Fluorescent Fish FAQ, <http://www.glofish.com/faq.asp> (last visited June 15, 2010); see generally Andrew B. Perzigian, Genetic Engineering and Animal Rights: The Legal Terrain and Ethical Underpinnings, Animal Legal and Historical Center (2003), <http://www.animallaw.info/articles/ddusgeneticengin.htm>.

108. The U.S. Congress recently almost passed a law that would have outlawed the sale of chimpanzees. See Captive Primate Safety Act, H.R. 80, 111th Cong. § 3 (2009) (as reported to Senate, July 20, 2009); see also Joshua Rhett Miller, Chimpanzee Attack Revives Calls for Federal Primate Law, Fox News (Feb. 18, 2009), <http://www.foxnews.com/story/0,2933,495787,00.html>.

carry out the process of animal adoption. However, there are few laws in place to standardize this process by defining who is qualified to do so, or what is the property status of an adopted animal post-adoption. These are important issues for future articles.

Another possibility of change could occur for high-dollar-value animals. If a racehorse or a show dog sells for a five-figure amount, the animal should get some credit for his own high-market value. The law could provide that for animal sales of greater than \$10,000 per animal, 10% of the sale price be set aside in trust for the animal's well-being.

Remembering that the primary public policy consideration for living property is that the interests of the animal should be taken into account, it will be appropriate to consider the reality that not all humans or corporations are appropriate owners. Some do not have the interest or ability to take care of their property, which is an obligation for any owner of living property. One possibility for the legal system would be to consider giving the state or designated organizations the right to challenge a transfer of title when it is not in the best interest of the animal being transferred. For example, if a person dies and leaves six horses to an unemployed twenty-two-year-old with no resources to care for the horses, unless that person willingly transfers the horses to another person capable of providing care, the law should force divestment of title. The horses should not have to wait until they are in health distress before the issue of ownership is addressed.

Another possible limitation that the law could adopt would preclude corporations from owning animals. There is an argument that an animal, particularly a commercial farm animal, owned by an individual or a human family has the best opportunity to receive good care. But, the millionth pig owned by a global corporation is of no particular concern to the corporation. Humans' need for food, a corporation's need for profit, and the needs of 1 million pigs for quality life may not be capable of being balanced out.<sup>109</sup> Another possible approach would be to limit the number of animals that any artificial person could own.

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109. While legislatures seem unwilling to balance the corporate interest of profit with pig welfare by adopting protective legislation, more recently the adoption of law by voter referendum has shifted the law toward the welfare of the pigs. In the fall of 2008, California voters adopted Proposition 2, which outlawed the keeping of chickens, veal calves, and pigs in small confinement areas, although the implementation date is put off until 2015. With the adoption of Proposition 2 "Californians voted resoundingly to free about 20 million egg-laying hens of tiny cages." Carla Hall & Jerry Hirsch, *Prop. 2 Unlikely to Hike Egg Prices*, L.A. TIMES, Nov. 6, 2008, at C1. Similar legislation was adopted in Michigan in 2009 under threat of voter referendum. See Act of Oct. 12, 2009, 2009 Mich. Legis. Serv. 117 (West) (codified at MICH. COMP. LAWS ANN. § 287.746 (West 2010)).

### 3. Use of Property

Inherent in the proposition of keeping animals as living property is the consequence that their owners will use them. The use may be relatively benign, as with a companion cat who shares an apartment with the human owner, or perhaps the sheep who is required to give up her wool every year. Then, there are the horses who are required to carry their owners in return for bed and board. Less benign uses are faced by the mice who spend their short lives in laboratory cages or the chickens who give up their lives for human food or the dog who is used in dogfighting ventures.

Many advocates of legal rights for animals seek to eliminate any use of animals by humans. They believe that no chicken should be used for food, no mouse should be in the lab, no horse in a corral, and perhaps not even a cat in an apartment.<sup>110</sup> While an individual may have a personal philosophy about the use of animals, and conform his life in accordance with that philosophy, the non-use of animals is not now the social perspective that informs our legal system. An alternative to the ban on the use of animals by humans might be that only specifically, legislatively allowed uses of animals would be permitted. But the number and complexities of human uses of animals is so large that this is impractical. The world we find ourselves in requires us to work the other way. Human use of animals is presumed acceptable until and unless it has been forbidden by the law. This is how the law has developed in our common law system for almost the past 1,000 years and there is no real likelihood of changing this approach in the near term.

Ultimately, what is an acceptable use of an animal, of living property, is a political decision that balances any number of factors during the legislative process. As a result, prohibitions will arrive sporadically, by species, by fact situation. The majority of Americans have already decided, over the objection of many individual citizens, that dogs cannot be used for dogfighting ventures. No state seeks to control the conditions of dogs used in fighting or the fighting process itself; their use in fighting is entirely banned. This use is so disfavored that in many states, to use a dog in this manner is a felony. Likewise, our society, but not others, has decided that killing dogs for the use of their fur is unacceptable.<sup>111</sup> But it apparently remains acceptable in the United States to raise and kill mink solely for their fur.

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110. See sources cited *supra* note 3.

111. In 1999, Virginia adopted the following provision:

It is unlawful for any person to sell a garment containing the hide, fur, or pelt which he knows to be that of a domestic dog or cat. A violation of this section shall be punishable by a fine of not more than \$10,000.

VA. CODE ANN. § 3.2-6589 (2008). This is also the federal law. See 19 U.S.C. § 1308 (2006).

Society can decide that the use of primates in scientific research is not justified without reaching the question of whether the use of rats is justified. As in New Zealand, a law can be adopted that implements a ban on research use of primates in laboratories.<sup>112</sup> Likewise, it is possible to judge that the keeping of primates as pets should not be allowed without a decision about the keeping of parakeets.

Besides the issue of use, there is the key point of which branch of government will be expected to adopt these new views, the legislature or the courts. As common law property concepts are at issue, there is the possibility that court opinions, rather than legislative enactments, will acknowledge these new legal rights for animals. The option of using the courts to create legal rights for animals is not to be discounted, but will not be pursued in this Article.<sup>113</sup>

There is a second aspect to the issue of use. Even if the end use of an animal is permitted by the law, or rather, not prohibited by the law, society can still have objections to the conditions under which an animal is being kept for the use. This aspect is the focus of the traditional cruelty laws and has been part of the legal system since the New York laws of the 1860s. Thus, the chicken and mouse may not be able to object to their end use, but may be able to object to their living conditions. Again, it is up to the legislature to provide the definitions of what conditions may or may not be acceptable to society.

The present anti-cruelty laws are but a first step in this process of defining acceptable use. As such, they are a guide to the present-day social perspective about acceptable living conditions for animals, but these laws are still limited in nature and subject to extensive exemptions. The exemptions in particular need to be reexamined. It is no longer clear why agricultural corporations or zoos should be exempt from laws that prohibit general cruelty against animals or the duty to provide care.<sup>114</sup> It is time to face up to the living conditions endured by industrial agricultural animals and decide as a society not what is most profitable for corporations, but what are acceptable living conditions for animals who will become human food.<sup>115</sup> This Article cannot seek to answer

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112. See Peter Sankoff, *Five Years of the "New" Animal Welfare Regime: Lessons Learned From New Zealand's Decision to Modernize Its Animal Welfare Legislation*, 11 *ANIMAL L. REV.* 7, 7–9 (2005).

113. See WISE, *supra* note 4. In Brazil, plaintiffs in one case sought to establish legal rights for animals by filing a habeas corpus action for a chimpanzee, but unfortunately the chimpanzee died before a decision could be rendered. See Tribunal do Júri de Salvador [Jury Court of Salvador], No. 833085-3/2005, *In re Suica, Correio da Bahia*, 19.9.2005 (Brazil), available at <http://www.animallaw.info/nonus/cases/cabrsuicaeng2005.htm> (author's trans.).

114. See MICH. COMP. LAWS ANN. § 750.50(11)(d), (f) (West Supp. 2009).

115. California in 2008 made a judgment by ballot initiative when Proposition 2 was passed. The provision outlaws common industrial confinement practices involving pigs, chickens, and veal.

that complex question, but will suggest that under the concept of living property, commercial ownership of animals will be allowed only when the interests of the animals are given considerably more weight than is presently the case in industrial agriculture.<sup>116</sup>

### *B. Duties of Owners*

A key characteristic that distinguishes living property from other forms of property is that there can be a legal duty toward living property that will be enforced by courts. While some duties of non-interference will be imposed upon non-owners, this is more in the realm of tort and criminal law, not to be considered in this Article.<sup>117</sup> In the world of property law, the duty toward the animal by the owner is of both a positive and negative nature. As already suggested by some of the comprehensive state anti-cruelty laws, it is both a duty of not imposing harm as well as a duty of providing care.<sup>118</sup>

While many of the existing laws focus upon the physical well-being of the animals, there is a lack of legal focus on the mental well-being of animals. The primary exception to this statement is the poorly implemented requirement of the federal Animal Welfare Act that institutions holding primates must provide living conditions that promote the primates' mental well-being. This issue needs to be considered in the context of both specific places and species. For example, animals confined in zoos usually must endure significant space limitations and a duty of mental enrichment should be required from the zoos as compensation for the animals' space limitation. In addition, specific species may have such complex minds that they should not be caged or caged only if the owners can provide sufficient mental stimulation. These are issues of science<sup>119</sup> and judgment.

This Article cannot propose the full extent of the owner's duty; rather, it seeks to establish that there is a duty, and that this duty is owed to the animal. The reader can envision more of the colors and contours of this new paradigm if a duty toward an animal is viewed in the light of the legal duty of parents to their child. This is particularly easy when the animal is a pet, as many pets are treated as a child in a family. Good parents understand and provide for the

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*See supra* note 109.

116. For a discussion on the difficulties of making effective animal welfare laws, see Mariann Sullivan & David J. Wolfson, *The Regulation of Common Farming Practices*, in *ANIMAL LAW AND THE COURTS: A READER* 78–131 (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008).

117. *See Favre, supra* note 89.

118. *See supra* Part II.C.

119. *See* T.S. Stoinski et al., *A Preliminary Study of the Behavioral Effects of Feeding Enrichment on African Elephants*, *ZOO BIOLOGY* 485, 490 (2000); Ruth C. Newberry, *Environmental Enrichment: Increasing the Biological Relevance of Captive Environments*, 44 *APPLIED ANIMAL BEHAVIOUR SCI.* 229, 230 (1995).

needs of the child, even though the child does not assert these needs or may even assert needs that are in fact counter to their long-term best interests. (For example, the child wants unlimited computer time, the dog wants unlimited treats, and both want to play in the street.) The judgment of the parents has to be accepted as presumptively lawful, but there are limits after which the government will seek to intervene to protect the interests of the child (red card legal rights). So might the government, or private individuals authorized by the state, be allowed to intervene to protect the interests of animals (red and blue cards).

It might be noted that there is not a heading in this paper about the duties of animals toward humans. This arises, in part, out of a practical perspective that animals may have difficulty in understanding human interests. Just as the law imposes no duty upon human infants who do not yet understand external obligations or choices of action, it would also be inappropriate to require actions of animals that they cannot understand. One clear exception to the general statement arises in the case of dangerous dogs. Under many dangerous-dog laws, after some semblance of due process, dogs can and are sentenced to death for violations of the statute obligations imposed upon them not to harm humans.<sup>120</sup> For all practical purposes, the dog could well be considered the defendant in the proceeding as it is the dog's very life that may be at risk.

### *C. Rights of Animals*

At a primary level, this Article asserts the legal principle that living property has the capacity to hold legal rights. As will be discussed below, two primary consequences flow from this capacity. First, to some degree their interests have to be part of the legal consideration of any conflict of which they are a part. Second, remedies for breaches of rights have to flow directly to those who were harmed.<sup>121</sup> As many of the most important potential legal rights for animals will deal with living conditions, the availability of injunctive relief to prohibit certain conditions and the right to have ownership transferred will be more important to their rights than money awards; however, financial awards may well be appropriate in certain circumstances.

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120. For dangerous-dog law discussion, see generally FAVRE, *supra* note 73, at 180–83.

121. Stephen I. Burr, *Toward Legal Rights for Animals*, 4 ENVTL. AFF. 205, 227–28 (1975).

*The Nature of a Legal Right.* In a society such as ours, where formal interhuman and human-governmental relationships are controlled by laws, the amount of protection one receives is a function of the legal rights one holds. Fundamentally, a legal right involves the assurance by society that when another person acts inconsistently with a right that you hold, an authoritative public body will give some amount of consideration to your protest.

*Id.* at 227.

This Article does not suggest that there should be a magical point in time at which all animals (as defined above) will receive all the legal rights suggested below. Rather, this section suggests a broad frame of reference by which to understand and organize present and future legal rights. This Article is like the picture on the front of the jigsaw puzzle box. Seeing the picture does not predict when, if ever, all the pieces inside will come together, but having the picture will aid in the process. Particular legal rights will arrive by the legislature or by court opinions, as pieces of the puzzle. The puzzle itself may remain unfinished for quite awhile, but it is time to begin the assembly enterprise.

### 1. Standing

Standing for red card and blue card animal legal rights does not require a mention of the concept of standing, as the government or a private human will have to deal with the standing issue.<sup>122</sup> But if a preferred, green card right is being asserted, then the standing of the animal is an issue. While standing is often discussed as an independent procedural issue, in fact it is tied very closely to the existence of a legal right. If a statute was adopted that said “any animal being held in conditions which violate the state anti-cruelty law may bring an action to contest the animal’s ownership and possession,” then inherent in the language is the granting of standing to any animal who seeks to exercise the legislatively created right. In a 2004 Ninth Circuit case, again dealing with whales, the court said as much:

It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.<sup>123</sup>

Identifying the plaintiff might be more difficult in some animal law contexts. Lawsuits normally require specific plaintiffs, in part because of the need to develop a set of facts that will frame the legal issues of a case. For living property, there are two varieties of legal personalities that may be a plaintiff: the individual and the group. If the animal in question has a name, then he

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122. For a discussion of standing in the environmental law context, see generally ROGER W. FINDLEY & DANIEL A. FARBER, *ENVIRONMENTAL LAW* 1–26 (7th ed. 2008); and Andrew Long, *Standing & Consensus: Globalism in Massachusetts v. EPA*, 23 J. ENVT. L. & LITIG. 73 (2008).

123. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004). For a general discussion of human standing in the traditional animal law context, see FAVRE, *supra* note 73, at 326–29.

has the capacity of individual legal personality, of having cases filed in his individual name. If an animal is unnamed, he can only be part of a group personality by geographic location, species, or some combination of the two. Thus, the green card right suggested in the prior paragraph might be exercised by Thomas “the cat” Hopkins, or Hopkins’ Rabbits, or the Rabbits of 245 Elm Street. In all cases, the plaintiffs will be specific animals around which a set of facts can be developed.

While states or the federal government could articulate the existence of “limited legal personality” for living property in a general procedural statute, it is not a prerequisite to standing. Any time a law acknowledges a preferred (green card) legal right for an animal or group of animals, inherent in doing so is the awarding of limited legal personality for animals to exercise the legal right in their own names.

## 2. A Few Rights

Within this new property status, animals have the right:

1. Not to be held for or put to prohibited uses.
2. Not to be harmed.
3. To be cared for.
4. To have living space.
5. To be properly owned.
6. To own property.
7. To enter into contracts.
8. To file tort claims.

This list has been derived from the pondering of the author. It is not the definitive list for all time, but a starting list to initiate further discussion. A prior effort on behalf of agricultural animals resulted in a list referred to as the “five freedoms.”<sup>124</sup> While many of the concerns within those five freedoms are also found within the above list, the proposed list is not a derivation of that list and is meant to have much broader application.

An example of each of the above should help demonstrate the possible scope of each right.

1. *Not to be held for or put to prohibited uses.* Prohibited uses will become a longer list as society becomes more protective of animal interests. An initial list might include: animals used against animals in blood sports,

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124. The five freedoms are: Freedom from fear and distress; freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury, and disease; and the freedom to express normal behavior. For fuller discussion, see FAVRE, *supra* note 73, at 294–96. See generally Farm Animal Welfare Council, Five Freedoms, <http://www.fawc.org.uk/freedoms.htm> (last visited June 15, 2010).



horsemeat for human consumption, great apes for research, pigeons for target practice, elephants in zoos, or snakes as pets.

The list of prohibited uses can be developed by using the general principle that a use should not constitute a significant interference with the well-being of the animals involved. For example, a fair case can be made that the use of greyhound dogs at the race track is detrimental to almost all the dogs within the industry, without any significant advantage to humans.<sup>125</sup> The human interest in gambling can be satisfied hundreds of other ways; there is no need for thousands of dogs to suffer for the realization of that human interest. Therefore, legislative prohibitions on the racing of dogs could easily be adopted. On the other hand, the keeping of dogs for breed shows might be judged as not to interfere with the significant interests of the dogs. But perhaps a full study of dogs in breed shows and of all the dogs bred with the hope of entering breed shows should be done with an eye toward the overall quality of life for the broader set of dogs, not just the winners. Horse racing is harder to judge as a full enterprise. Clearly, some horses in the industry are treated very well, but the quality of life for all of the horses bred to be racers is not so clear. Additionally, there are risks of drugs and injuries that even the successful horse must face.<sup>126</sup>

Another possible measure of whether a particular use is acceptable is whether the animal has to be kept in a cage for the human to use the animal. If long-term cage confinement is required, then perhaps the use should be prohibited. So, confinement of animals in zoos and research facilities should be examined in light of the degree to which the confinement interferes with the interests of the animal in the cage versus the benefits to be received by such confinement, in light of available research alternatives.<sup>127</sup>

2. *Not to be harmed.* The right not to be harmed, not to experience pain and suffering, is the oldest and most obvious of legal rights for some animals. The original New York law made it a crime for any person to “torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or

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125. See generally Michael Atkinson & Kevin Young, *Greyhound Racing and Sports-Related Violence*, in BETWEEN THE SPECIES 213 (Arnold Arluke & Clinton Sanders eds., 2009). Nearly 30,000 young greyhounds are killed in North America every year when they are no longer able to win or place. Approximately 5,000 to 7,000 farm puppies are culled annually and more simply “go missing” without being registered to an owner. *Id.*

126. See Cynthia F. Hodges, *That’s the Breaks: Trainer Responsibility for Racehorse Breakdowns in New York*, Animal Legal and Historical Center (2008), <http://www.animallaw.info/articles/ddusracehorsetrainer.htm>.

127. First, there must be a definition of a cage: an enclosure that significantly limits the mobility and life experience of an animal put into the confined space of the enclosure. The cage under the Animal Welfare Act for a chimpanzee is five by five by seven feet. See 9 C.F.R. § 3.80 (2009). This is very unacceptable for a primate, but ten mice could well live a full life within this space.

needlessly mutilate or kill . . . any living creature.”<sup>128</sup> Torture, by definition, is unacceptable infliction of pain and suffering; often the use of poison is also a flat prohibition.<sup>129</sup> Notice that the prohibitions against pain, suffering, and death are usually qualified by the terms such as “unjustified” or “unnecessary.” This means that the legislature has recognized that a balancing of the interests of the animals against the interests of the humans will have to be judged by the jury or judge to determine what is acceptable within their society.<sup>130</sup>

Sometimes, a social consensus can become a political consensus and a specific act becomes illegal. Thus, some states prohibit the docking of tails and the cutting of ears, while the practices’ necessity, and thus legality, is a jury question in others.<sup>131</sup> It will be better for the animals if more social consensus could be stated by the legislature in the form of prohibitions. Going to a criminal jury trial is a significant hardship on one individual when the judgment about the appropriateness of the conduct, like docking a tail, will not be understood until the jury gives its verdict under terms such as “unnecessary.”

In this category, it is not the creation of the right that is underdeveloped, but the human activities statutorily exempted from the general prohibitions that need to be addressed. To give blanket exemptions to zoos and

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128. Act of Apr. 12, 1867, ch. 375, § 1, 1867 N.Y. Laws 86 (current version at N.Y. AGRIC. & MKTS. § 353 (Consol. 2004)).

129. See MICH. COMP. LAWS ANN. § 750.50b(2) (West Supp. 2009) (noting that it is illegal for a person to “without just cause . . . knowingly administer poison to an animal, or knowingly expose an animal to any poisonous substance”). But, the killing of rats and other pests is exempted. See *id.* § 750.50b(8)(c).

130. *People v. Voelker*, 658 N.Y.S.2d 180, 181 (N.Y. Crim. Ct. 1997). The defendant was found guilty of charges stemming from a videotaped incident wherein defendant cut off the heads of three live, conscious iguanas and allegedly cooked and consumed the animals. *Id.* The tape of the incident was broadcast by Manhattan Neighborhood Network in a show entitled “Sick and Wrong.” *Id.* While eating the iguanas might have been a justified reason for their death, making a tape for showing the public was not.

131. An example of the legislature drawing the line can be found in N.Y. AGRIC. & MKTS. LAW § 365 (Consol. 2004), which states: “1. Whoever clips or cuts off or causes or procures another to clip or cut off the whole or any part of an ear of any dog unless an anaesthetic shall have been given to the dog and the operation performed by a licensed veterinarian, is guilty of a misdemeanor. . . .” *Id.*

In Indiana there is not a specific statute to deal with cropping and the state had to prosecute, claiming a violation of the prohibition against “torture.” *Elisea v. State*, 777 N.E.2d 46, 47–48 (Ind. Ct. App. 2002). The defendant was convicted of cruelty to animals and practicing veterinary medicine without a license after cropping several puppies’ ears with a pair of office scissors while the puppies were under no anesthesia. The court held that the evidence supported conviction for cruelty under the definition of torture. See also Amy L. Broughton, *Cropping and Docking: A Discussion of the Controversy and the Role of Law in Preventing Unnecessary Cosmetic Surgery on Dogs*, Animal Legal and Historical Center (2003), <http://www.animallaw.info/articles/dduscroppingdocking.htm>.

agricultural activities is not appropriate. In theory, a Michigan zookeeper has no legal duty to provide care to his animals.<sup>132</sup> This means that if an animal starved to death, no criminal charges could be filed. There is no public policy argument to justify this result. Another sweeping exemption is often given to owners of agricultural animals.<sup>133</sup>

3. *To be cared for.* There are many state and some federal laws dealing with the issue of care. The providing of water and food is obvious, and was part of the New York 1867 law.<sup>134</sup> Today's duty of care laws can be much more expansive,<sup>135</sup> but society has not yet made a full consideration of the tradeoffs between care for animals, the financial costs of care to human owners, and the judgment about the value of an animal's life with pain and suffering versus the animal's death.<sup>136</sup> The law does not address the social needs of many animals. Herd animals like sheep and cows clearly prefer being with others of the same species and having even a friendly human owner is not a substitute for a companion of the same species; yet, requirements of companionship are not presently part of the law. At a broader level, we have not yet had a discussion about a duty to provide for the mental well-being of animals. For example, if an infant animal has a supporting mother, for how long should the infant stay with the mother? The well-being of the infant animal, not profit maximization for the owner, should be the dominant factor in such a decision.

Finally, under the umbrella of duty to provide care there is the duty to let the animals experience the fullness of life, as provided by their genetic heritage. If a dog is kept for his entire life in a small room, the dog could well receive food and water, veterinary care, and exercise; but, the dog may never be able to experience what it is like to be a dog: to run after a rabbit, to discover new smells, to play with another dog, or have a tummy rubbed by a human. It is not that the dog in the room is in pain or could be shown to be suffering, but that the owner/keeper has prevented him from realizing or experiencing life as his DNA has programmed him to do.

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132. See MICH. COMP. LAWS ANN. § 750.50(11)(d).

133. "This section does not prohibit the lawful killing of livestock or a customary animal husbandry or farming practice involving livestock." *Id.* § 750.50b(8). In most states there has never been a court case to determine the scope of the term "customary farming practices."

134. Act of Apr. 12, 1867, ch. 375, § 1, 1867 N.Y. Laws 86 (current version at N.Y. AGRIC. & MKTS. § 353 (Consol. 2004)).

135. See MICH. COMP. LAWS ANN. § 750.50(1)(a) ("Adequate care' means the provision of sufficient food, water, shelter, sanitary conditions, exercise, and veterinary medical attention in order to maintain an animal in a state of good health.").

136. For a full discussion of some of the difficulties contained in this simple phrase, see David Favre, *The Duty of Owners to Provide Veterinary Medical Care to Animals*, in *ANIMAL LAW AND THE COURTS: A READER* 132–66 (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008).

A key component of psychological well-being is the opportunity to utilize the capabilities that each animal inherently possesses. It does not matter if science can show that a sow in confinement facilities, on concrete for her life, is not in pain or that stress hormones are absent. If a sow has never been able to put her snout into the dirt, then she has never been able to fully experience what it means to be a pig. Cows should eat grass and chickens should search and scratch. It is unethical for humans to use animals unless the method of use allows the animal to experience the critical components of life for that animal, and the law should reflect this duty.

4. *To have living space.* This right is very important to focus upon as it is the substitute for the human right of personal liberty. As property, animals will be within the possession and control of owners. As such, they cannot have the personal liberty that wild animals have.<sup>137</sup> But, an owner has the duty to provide adequate space for any living property that is possessed. While some laws presently address the need for shelter as part of the duty to provide care, in criminal provisions, shelter is only part of the issue. While this can be tied to mental well-being, it deserves consideration by itself. If we are to respect and consider the interests of animals, the space provided for the exercise of their inherent capabilities is critical. For example, a number of years ago the Detroit Zoo moved its chimpanzees out of their prison-cell-sized rooms in the primate house, clearly unacceptable, to a four-acre exhibit which can be judged as acceptable.<sup>138</sup> Now the chimpanzees have the opportunity for complex group interaction and can opt to be in private or public spaces.

As an extreme example, consider the 2003 case in which an individual was found to have a 350-pound Bengal–Siberian tiger, an alligator, another tiger with cubs, rabbits, and a tarantula in his apartment. The owner said his “interest” was in trying to create a Garden of Eden.<sup>139</sup> Authorities removed the animals, but the news article does not say under which law. Many states have outlawed the personal possession of animals such as tigers and lions, believing that regardless of the interests or motivations of individual humans, neither the animals nor human neighbors should assume the risk of such arrangements.<sup>140</sup>

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137. See discussion *supra* notes 90–91 and accompanying text.

138. This description is based on the author’s personal observation of the Great Ape House at the Detroit Zoo before it was closed in 1982. In 1989, a new exhibit opened at the zoo: “[A] new 4-acre, \$7.5 million facility that comes as close to a natural chimpanzee environment as possible [given the constraints of an urban zoo] in a northern latitude.” Tom Hundley, *New Zoo Display Lets Chimps Be Themselves*, CHI. TRIB., Dec. 13, 1989, at 6.

139. See Alan Feuer & Jason George, *Police Subdue Tiger in Harlem Apartment*, N.Y. TIMES, Oct. 5, 2003, at 35.

140. See, e.g., CONN. GEN. STAT. ANN. § 26-40a (West 2008) (making it illegal to own any member of a number of animal families, including “felidae [large cats],” “canidae [wolves],” and

5. *To be properly owned.* While violation of the first four rights can be remedied without removing an animal from his or her owner, there is a point at which adverse effects on an animal cause the capacity of the owner to come into question. While it is possible to conceive of removal of ownership simply as a remedy for a violation of the listed animal rights, acceptance of responsibility toward living property is so fundamental to this new paradigm as to require it be stated as a stand-alone right. Any owned animal has the right to expect his or her owner to have the capability and willingness to provide the level of care and space that the particular animal needs.

This issue can arise in either the civil law or criminal law context. While the law should continue to presume that humans can own animals, upon a showing of a particular human not being able to do so, the law should not hesitate to step in and transfer ownership away from the incapable to the capable, and enjoin future ownership of animals. This will be done without compensation to the owner, with non-compensation being in effect a civil fine for failure to provide the necessary living conditions. An extreme fact pattern that raises this issue is seen in the cases of animal hoarding. The previously described North Carolina case is but one example.<sup>141</sup>

While new statutes might be adopted to more specifically define the duties of an owner, the existing anti-cruelty laws usually constitute a workable set of standards that could be used in a civil lawsuit. It will not be a defense for an owner that possession of an animal was given to another person, as the duty created by this right cannot be delegated. A red card version of this right already exists in Illinois that authorizes the removal of animals from their owners for failure to provide the required care.<sup>142</sup> The Illinois statute does not

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“ursidae [bears],” and IOWA CODE ANN. § 717F.1.5.a. (Supp. 2009) (listing a number of animal families as “dangerous” and thereby illegal to own, including, but not limited to, felidae carnivora, canidae carnivora, hyaenidae carnivore (hyenas), ursidae carnivore, rhinoceros tidae (rhinoceros), proboscidea (elephants), crocodilia (crocodiles), etc.).

141. See *supra* notes 50–54 and accompanying text. The North Carolina statute provides:

[I]f the court finds by a preponderance of the evidence that even if a permanent injunction were issued there would exist a substantial risk that the animal would be subjected to further cruelty if returned to the possession of the defendant, the court may terminate the defendant’s ownership and right of possession of the animal and transfer ownership and right of possession to the plaintiff or other appropriate successor owner. For good cause shown, the court may also enjoin the defendant from acquiring new animals for a specified period of time or limit the number of animals the defendant may own or possess during a specified period of time.

N.C. GEN. STAT. ANN. § 19A-4 (West 2007).

142. See 510 ILL. COMP. STAT. ANN. 70/12 (West 2004):

Impounding animals; notice of impoundment: (a) When an approved humane investigator, a Department investigator or a veterinarian finds that a violation of this Act has rendered an animal in such a condition that no remedy

require criminal charges to be filed prior to the state taking action. The previously discussed North Carolina law would support a removal action as either a red card or blue card. Many states at the moment allow removal of the animal from her owner only in conjunction with a criminal law proceeding.

A specific context in which the issue of who is an appropriate owner of an animal arises is that of a divorce proceeding in which the husband and wife have a dispute as to who should have title and possession of the pet. In this case, prior ownership is not as important as is the right of the animal to have a caring owner. Thus, when a court makes a decision about a pet, the primary factor should be, What is in the best interest of the animal?<sup>143</sup>

6. *To own property.* The legal rights discussed above deal with the life conditions and the well-being of the animal. Legal rights 6, 7, and 8 acknowledge the new legal personality that comes with being the new category of property, living property. To be living property is also to have the legal capacity to own other property. The primary property contemplated is financial property, money, and assets, but it could also include personal property, intellectual property, and real property (as equitable owners<sup>144</sup>). This right has already been acknowledged in the world of trust.<sup>145</sup> This new concept of living property owning personal property would not be extended to other categories of traditional personal property.

One possible application of this idea arises when contemplating compensation to animals for their labors. An owner does not have to pay an animal for the lawful use of the animal, room and board and quality of life being compensation. But, any time that money comes to the owner because of the presence or efforts of the animal, the animal should have an equitable interest in at least some portion of the money which the animal helped generate. Consider the racehorse that wins a \$100,000 prize. While the efforts of the owner and trainer clearly were important, without the efforts of the horse, the money would not have been won. Our historical acceptance of the labor theory of property supports the proposition that some money be set

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or corrective action by the owner is possible, the Department must impound or order the impoundment of the animal. If the violator fails or refuses to take corrective action necessary for compliance with Section 11 of this Act, the Department may impound the animal. . . . Any expense incurred in the impoundment shall become a lien on the animals.

*Id.*

143. See Lauren Magnotti, Note, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 ST. JOHN'S L. REV. 455 (2006).

144. How an animal might be equitably self-owned is set out in David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000).

145. See *supra* notes 55–56 and accompanying text.

aside for the benefit of the horse.<sup>146</sup>

Another example of the application of the concept that animals can own property arises if property creation is considered. If humans can create new works of art that receive the protection of copyright laws, so should the original works of animals. Elephants and chimpanzees are capable of creating purposeful art. As the creative artists, they should have intellectual property rights just as humans might have.<sup>147</sup> Their owners may well be their agents for purposes of interacting with the human world. But, as with children, the fact that animals do not understand the rules of copyright law does not justify the owners being the sole beneficiaries of creative work of their animals.

As an animal is not likely to understand the concepts of title and ownership, and may not make good decisions about the investment and use of her money or other property,<sup>148</sup> the money should be treated as money made by underage human children. When a child earns or is awarded money over some amount, then adult humans, usually the child's parents, set aside the money to use for the benefit of the child. This may be a formal or informal trust. Likewise, an animal can have a formal or informal trust of which the animal is the beneficiary. This would make the animal the equitable owner of the property in the trust.<sup>149</sup>

7. *To enter into contracts.* There are two general types of contracts that involve animals. The first is the transfer of the animal to another who will care for the animal. This will usually require the owner to pay the keeper (a bailment). For example, 1,000 head of cattle might be owned by Smith, but are transferred to the Flying J for eighteen months at \$5 per head per month. The second type of contract is when the owner provides the animal for a service and the owner is paid by the contracting party for the service. This may or may not involve the transfer of possession. It can involve a bear with a part in a movie or a horse who spends a few weeks on a ranch for breeding purposes. For the first type of contract, a primary concern is that the physical transfer to a new location does not violate any of the animal's rights.

In the second type of contract, while an animal does not have the capacity to enter into a contract independent of the owner of the animal, any animal

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146. Lawrence C. Becker, *The Labor Theory of Property Acquisition*, 73 J. PHIL. 653 (1976); JOHN LOCKE, *Second Treatise on Government*, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111–21 (Ian Shapiro ed., Yale Univ. Press) (2003).

147. This possibility is given extensive consideration in Dane E. Johnson, *Statute of Anne-imals: Should Copyright Protect Sentient Nonhuman Creators?*, 15 ANIMAL L. 15 (2008). The author proposes “an equitable title concept of copyright ownership shared between animals and the human organizations to which they may be connected.” *Id.* at 17–18.

148. But then again, the same could be said about any number of adult humans.

149. For a detailed consideration of how the concept of equitable ownership can be considered for animals, see FAVRE, *supra* note 89.

who is the subject of a contract has an equitable interest in the contract, taking something like the role of a third-party beneficiary or an equitable interest holder in the contract. The presumption is that the owner will have the interests of the animal in balance any time the owner enters into a contract for the transfer or services of the animal. If a contract, on its face, violates any of the legal rights of the animal who is the subject of the contract, the contract is void on its face as contrary to public policy. Additionally, a void contract constitutes prima facie evidence of the unfitness of the owners who entered into the contract.

If an animal is a part of the contract, as in the second fact pattern, then some of the benefits of the contract should run to the animal's benefit. If possession of a panda is being transferred by contract for a summer exhibit at a zoo, and the owner of the panda is to receive \$100,000 for the transfer and temporary possession (bailment) by a zoo, then the panda should be considered a party to the contract. The zoo would have to provide for all the rights of the panda. Presumably, the panda will not agree to the contract if it is contrary to her safety and well-being and there is insufficient compensation for the dislocations of her life. Likewise, those humans who provide the animals who play major roles in the entertainment industry will be required to acknowledge the interests of the animals in question, and some of the benefits of the contract should flow directly to these animals.

8. *To file tort claims.* Animals should have the right to sue humans who violate their primary interests. If a human injures an animal, then perhaps, in at least the egregious cases, the animal should have a preferred green card legal right to sue the wrongdoer. To beat a chimpanzee with a club is no different to the chimpanzee than what is experienced by a physically abused human child. Such a beating is as wrong to the primary interests of the chimpanzee as it is to the child. The law should be open to animals who seek injunctive relief for ongoing harms, but damages should also be available where appropriate. In a prior article, this topic was explored in more detail, where the tort of "intentional interference with a fundamental interest" was proposed, so it will not be expanded upon in this Article.<sup>150</sup>

## VI. CONCLUSION

As developed in this Article, the proposition that animals can possess legal rights is already supported by the reality of events within our legal system. Animals already have a modest variety of legal rights within the categories of weak (red), strong (blue), and preferred (green) rights. To make

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150. See *id.* The reader should recognize that this article predates the present Article by five years and therefore some of the concepts in that article might well be modified by the subsequent thinking reflected in the present Article.



a more coherent package of all the animal-related public policy issues, it will be useful to acknowledge the existence of a fourth category of property, living property. Once this new category is separated out from other property, a focused scholarly consideration of the issues will result in a new list of legal rights for at least some of these animals. This Article has suggested both what some of the rights might be and how traditional rules of property law might be modified to accommodate the presence of this new category.

At this point in history, the non-human animals of our Earth are not our brothers, nor our equals, but like our children.<sup>151</sup> They have interests of their own that deserve to be nurtured and protected from human harm, both in the consideration of ethical acts and the laws that we humans implement on their behalf.

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151. As an example of how this attitude shift is already occurring, consider the Michigan case in which a dog owner knowingly allowed his dog to starve to death by abandoning the house in which the dog was living. The statement of the judge at trial was that “[t]his was murder. An animal, in this court’s opinion, is no different than a child.”” Amber Hunt, *Man Gets Jail Time for Starving Dog to Death*, DETROIT FREE PRESS, July 19, 2007, at B1.

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Animals–Property or Persons?

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# Animals–Property or Persons?

Gary L. Francione

## **Abstract**

When it comes to our moral and legal obligations to nonhuman animals, we suffer from “moral schizophrenia.” We claim to recognize that animals have morally significant interests in not suffering and that it is morally wrong to inflict “unnecessary” suffering on animals. Although we have laws that purport to reflect these moral sentiments, the overwhelming portion of the pain, suffering, and death that we impose on animals cannot be regarded as necessary in any sense. Our moral schizophrenia is related to the status of animals as property, which means that, as a practical matter, animal suffering will be regarded as necessary whenever it benefits human property owners. If we really are to take animal interests seriously, we can no longer treat animals as human resources. This does not mean that we must give animals the rights that we accord to humans, or that we cannot choose human interests over animal interests in situations of genuine conflict. Rather, we must recognize that animals have one right—the right not to be treated as property, and we cannot create conflicts between human and animals by using animals in ways in which we would never use any humans. As long as animals are human property, the principle of equal consideration can never apply to them (just as it could not apply to slaves), and animals will necessarily remain as nothing more than things that possess no morally significant interests. The theory presented applies to any animal that is sentient and does not require that animals have any additional cognitive characteristics.

## **Animals—Property or Persons?**

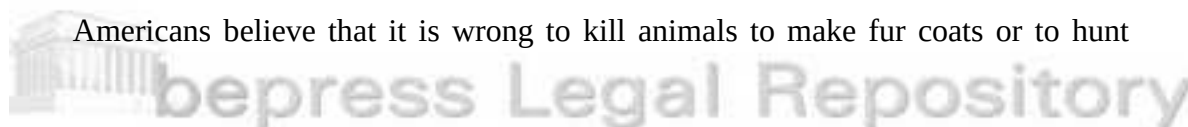
**Gary L. Francione**

When it comes to other animals, we humans exhibit what can best be described as moral schizophrenia. Although we claim to take animals seriously and to regard them as having morally significant interests, we routinely ignore those interests whenever it benefits us. In this essay, I argue that our moral schizophrenia is related to the status of animals as property, which means that animals are nothing more than *things* despite the many laws that supposedly protect them. If we are going to make good on our claim to take animal interests seriously, then we have no choice but to accord animals one right: the right not to be treated as our property.

Our acceptance that animals have this one right would require that we abolish and not merely better regulate our institutionalized exploitation of animals. Although this is an ostensibly radical conclusion, it necessarily follows from certain moral notions that we have professed to accept for the better part of 200 years. Moreover, recognition of this right would not preclude our choosing humans over animals in situations of genuine conflict.

### **Animals: Our Moral Schizophrenia**

There is a profound disparity between what we say we believe about animals, and how we actually treat them. On one hand, we claim to take animals seriously. Two-thirds of Americans polled by the Associated Press agree with the following statement: “An animal’s right to live free of suffering should be just as important as a person’s right to live free of suffering,” and more than 50 percent of Americans believe that it is wrong to kill animals to make fur coats or to hunt



them for sport.<sup>1</sup> Almost 50 percent regard animals to be “just like humans in all important ways.”<sup>2</sup> These attitudes are reflected in other nations as well. For example, 94 percent of Britons<sup>3</sup> and 88 percent of Spaniards<sup>4</sup> think that animals should be protected from acts of cruelty, and only 14 percent of Europeans support the use of genetic engineering that results in animal suffering, even if the purpose is to create drugs that would save human lives.<sup>5</sup>

On the other hand, our actual treatment of animals stands in stark contrast to our proclamations about our regard for their moral status.<sup>6</sup> Consider the suffering of animals at our hands. In the United States alone, according to the U.S. Department of Agriculture, we kill more than 8 billion animals a year for food; every day, we slaughter approximately 23 million animals, or more than 950,000 per hour, or almost 16,000 per minute, or more than 260 every second. This is to say nothing of the billions more killed worldwide. These animals are raised under horrendous intensive conditions known as “factory farming,” mutilated in various ways without pain relief, transported long distances in cramped, filthy containers, and finally slaughtered amid the stench, noise, and squalor of the abattoir. We kill billions of fish and other sea animals annually. We catch them with hooks and allow them to suffocate in nets. We buy lobsters at the supermarket, where they are kept for weeks in crowded tanks with their claws closed by rubber bands and without receiving any food, and we cook them alive in boiling water.

Wild animals fare no better. We hunt and kill approximately 200 million animals in the United States annually, not including animals killed on commercial

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1. David Foster, “Animal Rights Activists Getting Message Across: New Poll Findings Show Americans More in Tune with ‘Radical’ Views,” *Chicago Tribune*, Jan. 25, 1996, at C8.

2. John Balzer, “Creatures Great and—Equal,” *L.A. Times*, Dec. 25, 1993, at A1.

3. Julie Kirkbride, “Peers Use Delays to Foil Hedgehog Cruelty Measure,” *Daily Telegraph*, Nov. 3, 1995, at 12.

4. Edward Gorman, “Woman’s Goring Fails to Halt Death in the Afternoon,” *Times* (London), June 30, 1995, Home News Section.

5. Malcolm Eames, “Four Legs Very Good,” *Guardian*, Aug. 25, 1995, at 17.

6. For sources discussing the numbers of animals used for various purposes, see Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?*, at xx-xxi (2000).

game ranches or at events such as pigeon shoots. Moreover, hunters often cripple animals without killing or retrieving them. It is estimated, for example, that bow hunters do not retrieve 50 percent of the animals hit with their arrows. This increases the true death toll from hunting by at least tens of millions of uncounted animals. Wounded animals often die slowly, over a period of hours or even days, from blood loss, punctured intestines and stomachs, and severe infections.

In the United States alone, we use millions of animals annually for biomedical experiments, product testing, and education. Animals are used to measure the effects of toxins, diseases, drugs, radiation, bullets, and all forms of physical and psychological deprivations. We burn, poison, irradiate, blind, starve, and electrocute them. They are purposely riddled with diseases such as cancer and infections such as pneumonia. We deprive them of sleep, keep them in solitary confinement, remove their limbs and eyes, addict them to drugs, force them to withdraw from drug addiction, and cage them for the duration of their lives. If they do not die during experimental procedures, we almost always kill them immediately afterward, or we recycle them for other experiments or tests and then kill them.

We use millions of animals for the sole purpose of providing entertainment. Animals are used in film and television. There are thousands of zoos, circuses, carnivals, race tracks, dolphin exhibits, and rodeos in the United States, and these and similar activities, such as bullfighting, also take place in other countries. Animals used in entertainment are often forced to endure lifelong incarceration and confinement, poor living conditions, extreme physical danger and hardship, and brutal treatment. Most animals used for entertainment purposes are killed when no longer useful, or sold into research or as targets for shooting on commercial hunting preserves.

And we kill millions of animals annually simply for fashion. Approximately 40 million animals worldwide are trapped, snared, or raised in intensive confinement on fur farms, where they are electrocuted or gassed or have

their necks broken. In the United States, 8–10 million animals are killed every year for fur.

For all of these reasons, we may be said to suffer from a sort of moral schizophrenia when it comes to our thinking about animals. We claim to regard animals as having morally significant interests, but our behavior is to the contrary.

### **Animals as Things**

Before the nineteenth century, the foregoing litany of animal uses would not have raised any concern. Western culture did not recognize that humans had any moral obligations to animals because animals did not matter morally at all. We could have moral obligations that concerned animals, but these obligations were really owed to other humans and not to animals. Animals were regarded as things, as having a moral status no different from that of inanimate objects.

As late as the seventeenth century, the view was advanced that animals are nothing more than machines. René Descartes (1596–1650), considered the founder of modern philosophy, argued that animals are not conscious—they have no mind whatsoever—because they do not possess a soul, which God invested only in humans. In support of the idea that animals lack consciousness, Descartes maintained that they do not use verbal or sign language—something that every human being does but that no animal does. Descartes certainly recognized that animals act in what appear to be purposive and intelligent ways and that they seem to be conscious, but he claimed that they are really no different from machines made by God. Indeed, he likened animals to “automatons, or moving machines.”<sup>7</sup> Moreover, just as a clock can tell time better than humans can, so some animal machines can perform some tasks better than humans can.

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7. René Descartes, “Discourse on the Method,” pt. V, in 1 *The Philosophical Writings of Descartes* 111, 139 (John Cottingham, Robert Stoothoff, & Dugald Murdoch trans., Cambridge Univ. Press 1985) (1637). Some scholars have argued that Descartes did recognize animal consciousness in certain respects, and that traditional interpretations of Descartes are incorrect. See, e.g., Daisie Radnor & Michael Radnor, *Animal Consciousness* (1989). There is, however, no doubt that Descartes regarded animals as morally indistinguishable from inanimate objects and, to the extent that he viewed animals as conscious and as having interests in not suffering, he ignored those interests.

An obvious implication of Descartes's position was that animals are not sentient; they are not conscious of pain, pleasure, or anything else. Descartes and his followers performed experiments in which they nailed animals by their paws to boards and cut them open to reveal their beating hearts. They burned, scalded, and mutilated animals in every conceivable manner. When the animals reacted as though they were suffering pain, Descartes dismissed the reaction as no different from the sound of a machine that is functioning improperly. A crying dog, Descartes maintained, is no different from a whining gear that needs oil.

In Descartes's view, it is as senseless to talk about our moral obligations to animals, machines created by God, as it is to talk about our moral obligations to clocks, machines created by humans. We can have moral obligations that concern the clock, but any such obligations are really owed to other humans and not to the clock. If I smash the clock with a hammer, you may object because the clock belongs to you, or because I injure you when a piece of the clock accidentally strikes you, or because it is wasteful to destroy a perfectly good clock that could be used by someone else. I may be similarly obliged not to damage your dog, but the obligation is owed to you, not to the dog. The dog, like the clock, according to Descartes, is nothing more than a machine and possesses no interests in the first place.

There were others who did not share Descartes's view that animals are merely machines but who still denied that we can have any moral obligations to animals. For example, the German philosopher Immanuel Kant (1724–1804) recognized that animals are sentient and can suffer, but denied that we can have any direct moral obligations to them because, according to Kant, they are neither rational nor self-aware. According to Kant, animals are merely a means to human ends; they are “man's instruments.” They exist only for our use and have no value in themselves. To the extent that our treatment of animals matters at all for Kant, it does so only because of its impact on other humans: “[H]e who is cruel to



animals becomes hard also in his dealings with men.”<sup>8</sup> Kant argued that if we shoot and kill a faithful and obedient dog because the dog has grown old and is no longer capable of serving us, our act violates no obligation that we owe to the dog. The act is wrong only because of our moral obligation to reward the faithful service of other humans; killing the dog tends to make us less inclined to fulfill these human obligations. “[S]o far as animals are concerned, we have no direct duties.” Animals exist “merely as a means to an end. That end is man.”<sup>9</sup>

The view that we have no direct moral obligations to animals was also reflected in Anglo-American law. Before the nineteenth century, it is difficult to find any statutory recognition of legal obligations owed directly to animals.<sup>10</sup> To the extent that the law provided animals any protection, it was, for the most part, couched solely in terms of human concerns, primarily property interests. If Simon injured Jane’s cow, Simon’s act might violate a malicious mischief statute if it could be proved that the act manifested malice toward Jane. If Simon had malice toward the cow but not toward Jane, then he could not be prosecuted. It was irrelevant whether Simon’s malice was directed toward Jane’s cow or toward her inanimate property. Any judicial condemnation of animal cruelty was, with rare exceptions, expressed only as concern that such conduct would translate into cruelty to other humans, or that acts of cruelty to animals might offend public decency and cause a breach of the peace. That is, the law reflected the notion expressed by Kant and others that if there were any reason for us to be kind to animals, it had nothing to do with any obligation that we owed to animals, but only with our obligations to other humans.

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8. Immanuel Kant, *Lectures on Ethics* 240 (Louis Infield trans., Harper Torchbooks, 1963).

9. *Id.* at 239. There were others, such as Aristotle, St. Thomas Aquinas, and John Locke, who recognized that animals are sentient but who claimed that they lack characteristics such as rationality or abstract thought, and we could, therefore, treat them as things. See Francione, *supra* note 6, at 103–29. See also notes 74–97 and accompanying text.

10. A possible exception is the 1641 legal code of the Massachusetts Bay Colony, which prohibited cruelty to domestic animals. See Gary L. Francione, *Animals, Property, and the Law* 121 (1995). It is not clear whether this provision prohibited cruelty at least in part out of concern for the animals themselves, or only because cruelty to animals might adversely affect humans.

### **The Humane Treatment Principle: A Rejection of Animals as Things**

Consider the following example. Simon proposes to torture a dog by burning the dog with a blowtorch. Simon's only reason for torturing the dog is that he derives pleasure from this sort of activity. Does Simon's proposal raise any moral concern? Is Simon violating some moral obligation not to use the animal in this way for his amusement? Or is Simon's action morally no different from crushing and eating a walnut?

I think that most of us would not hesitate to maintain that blowtorching the dog simply for pleasure is not a morally justifiable act under any circumstances. What is the basis of our moral judgment? Is it merely that we are concerned about the effect of Simon's action on other humans? Do we object to the torture of the dog merely because it might upset other humans who like dogs? Do we object because by torturing the dog Simon may become a more callous or unkind person in his dealings with other humans? We may very well rest our moral objection to Simon's action in part on our concern for the effect of his action on other humans, but that is not our primary reason for objecting. After all, we would condemn the act even if Simon tortures the animal in secret, or even if, apart from his appetite for torturing dogs, Simon is a charming fellow who shows only kindness to other humans.

Suppose that the dog is the companion animal of Simon's neighbor, Jane. Do we object to the torture because the dog is Jane's property? We may very well object to Simon's action because the dog belongs to Jane, but again, that is not our first concern. We would find Simon's action objectionable even if the dog were a stray.

The primary reason that we find Simon's action morally objectionable is its direct effect on the dog. The dog is sentient; like us, the dog is the sort of being who has the capacity to suffer and has an interest in not being blowtorched.<sup>11</sup> The

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11. The neurological and physiological similarities between humans and nonhumans render the fact of animal sentience noncontroversial. Even mainstream science accepts that animals are sentient. For example, the U.S. Public Health Service states that "[u]nless the contrary is established, investigators should consider that procedures that cause pain or distress in human

dog prefers, or wants, or desires not to be blowtorched. We have an obligation—one owed directly to the dog and not merely one that concerns the dog—not to torture the dog. The sole ground for this obligation is that the dog is sentient; no other characteristic, such as humanlike rationality, reflective self-consciousness, or the ability to communicate in a human language, is necessary. We regard it as morally necessary to justify our infliction of harm on the dog simply because the dog can experience pain and suffering. We may disagree about whether a particular justification suffices, but we all agree that some justification is required, and Simon's pleasure cannot constitute such a justification. An integral part of our moral thinking is the idea that, other things being equal, the fact that an action causes pain counts as a reason against that action, not merely because imposing harm on another sentient being somehow diminishes us, but because imposing harm on another sentient being is wrong in itself. And it does not matter whether Simon proposes to blowtorch for pleasure the dog or another animal, such as a cow. We would object to his conduct in either case.

In short, most of us claim to reject the characterization of animals as things that has dominated Western thinking for many centuries. For the better part of 200 years, Anglo-American moral and legal culture has made a distinction between sentient creatures and inanimate objects. Although we believe that we ought to prefer humans over animals when interests conflict, most of us accept as completely uncontroversial that our use and treatment of animals are guided by what we might call the *humane treatment principle*, or the view that because animals can suffer, we have a moral obligation that we owe directly to animals not to impose unnecessary suffering on them.

The humane treatment principle finds its origins in the theories of English lawyer and utilitarian philosopher Jeremy Bentham (1748–1832). Bentham

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beings may cause pain or distress in other animals.” U.S. Department of Health and Human Services, National Institutes of Health, “Public Health Service Policy and Government Principles Regarding the Care and Use of Animals,” in *Institute of Laboratory Animal Resources, Guide for the Care and Use of Laboratory Animals* 117 (1996).

argued that despite any differences, humans and animals are similar in that they both can suffer, and it is only the capacity to suffer and not the capacity for speech or reason or anything else that is required for animals to matter morally and to have legal protection. Bentham maintained that animals had been “degraded into the class of *things*,” with the result that their interest in not suffering had been ignored.<sup>12</sup> In a statement as profound as it was simple, Bentham illuminated the irrelevance of characteristics other than sentience: “[A] full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?”<sup>13</sup>

Bentham’s position marked a sharp departure from a cultural tradition that had never before regarded animals as other than things devoid of morally significant interests. He rejected the views of those, like Descartes, who maintained that animals are not sentient and have no interests. He also rejected the views of those, like Kant, who maintained that animals have interests but that those interests are not morally significant because animals lack characteristics other than sentience, and that our treatment of animals matters only to the extent that it affects our treatment of other humans. For Bentham, our treatment of animals matters because of its effect on beings that can suffer, and our duties are owed directly to them. Bentham urged the enactment of laws to protect animals from suffering.

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12. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ch. XVII, para. 4, at 282 (footnote omitted) (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1781). I do not mean to suggest that Bentham was the first person ever to express a concern about animal suffering distinct from its effect on human character, nor that he was the only or the first to argue that humans and animals have morally significant interests in not suffering. Several years before Bentham, Rev. Humphry Primatt expressed the view that suffering was an evil irrespective of species. See Humphry Primatt, *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals* (London, T. Cadell 1776). Bentham clearly had a greater impact on both moral and legal thinking concerning the issue.

13. Bentham, *supra* note 12, at 282–83 n.b.

Bentham's views had a profound effect on various legal reformers, and the result was that the legal systems of the United States and Britain (as well as other nations) purported to incorporate the humane treatment principle in animal welfare laws. These laws are of two kinds: general and specific. General animal welfare laws, such as anticruelty laws, prohibit cruelty or the infliction of unnecessary suffering on animals without distinguishing between various uses of animals. For example, New York law imposes a criminal sanction on any person who "overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal."<sup>14</sup> Delaware law prohibits cruelty and defines as cruel "every act or omission to act whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted," and includes "mistreatment of any animal or neglect of any animal under the care and control of the neglecter, whereby unnecessary or unjustifiable physical pain or suffering is caused."<sup>15</sup> In Britain, the Protection of Animals Act of 1911 makes it a criminal offense to "cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate, or terrify any animal" or to impose "unnecessary suffering" on animals.<sup>16</sup> Specific animal welfare laws purport to apply the humane treatment principle to a particular animal use. For example, the American Animal Welfare Act, enacted in 1966 and amended on numerous occasions,<sup>17</sup> the British Cruelty to Animals Act, enacted in 1876,<sup>18</sup> and the British Animals (Scientific Procedures) Act of 1986<sup>19</sup> concern the treatment of animals used in experiments.

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14. N.Y. Agric. & Mkts. Law § 353 (Consol. 2002). The first known anticruelty statute in the United States was passed in Maine in 1821. New York passed a statute in 1829, but New York courts held as early as 1822 that cruelty was an offense at common law.

15. Del. Code. Ann., tit. 11, §§ 1325(a)(1) & (4) (2002).

16. Protection of Animals Act, 1911, ch. 27 § 1(1)(a) (Eng.). British legislation prohibiting cruelty to animals was passed as early as 1822.

17. 7 U.S.C. §§ 2131-2159 (2003).

18. Cruelty to Animals Act, 1876 (Eng.).

19. Animals (Scientific Procedures) Act, 1986 (Eng.).

The American Humane Slaughter Act, originally enacted in 1958, regulates the killing of animals used for food.<sup>20</sup>

As we saw earlier, if Simon injured Jane's cow, malicious mischief statutes required a showing that Simon bore malice toward Jane. To the extent that courts had any concern about cruelty to animals, this concern was limited to the effect that cruelty might have on public sensibilities or on the tendency of cruelty to animals to encourage cruelty to other humans. The passage of anticruelty laws allowed for Simon's prosecution even if he bore Jane no ill will and instead intended malice only to her cow. Moreover, these laws reflect concern about the moral significance of animal suffering, in addition to the detrimental repercussions of cruelty to animals for humans. Anticruelty laws are often explicit in applying to all animals, whether owned or unowned. Thus, whereas malicious mischief statutes were "intended to protect the beasts as property instead of as creatures susceptible of suffering," anticruelty statutes are "designed for the protection of animals."<sup>21</sup> They are intended "for the benefit of animals, as creatures capable of feeling and suffering, and [are] intended to protect them from cruelty, without reference to their being property."<sup>22</sup> The purpose of these laws is, in part, to instill in humans "a humane regard for the rights and feelings of the brute creation by reproving the evil and indifferent tendencies in human nature in its intercourse with animals."<sup>23</sup> They are said to "recognize and attempt to protect some abstract rights in all that animate creation, made subject to man by the creation, from the largest and noblest to the smallest and most insignificant."<sup>24</sup> Anticruelty laws acknowledge that because animals are sentient, we have legal obligations that we owe directly to animals to refrain from imposing unnecessary pain and suffering on them: "Pain is an evil," and "[i]t is impossible for a right

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20. 7 U.S.C. §§ 1901-1907 (2003).

21. *State v. Prater*, 109 S.W. 1047, 1049 (Mo. Ct. App. 1908).

22. *Stephens v. State*, 65 Miss. 329, 331 (1887).

23. *Hunt v. State*, 29 N.E. 933, 933 (Ind. Ct. App. 1892).

24. *Grise v. State*, 37 Ark. 456, 458 (1881).



mindful man . . . to say that unjustifiable cruelty [to animals] is not a wrong.”<sup>25</sup> Other animal welfare laws similarly focus on the suffering of animals as intrinsically undesirable.<sup>26</sup>

Many animal welfare laws, such as anticruelty statutes, are criminal laws. For the most part, only those moral rules that are widely accepted, such as prohibitions against killing other humans, inflicting physical harm on them, or taking or destroying their property, are enshrined in criminal laws. That many animal welfare laws are criminal laws suggests that we take animal interests seriously enough to punish violations of the humane treatment principle with the social stigma of a criminal penalty.

The humane treatment principle and the operation of the animal welfare laws that reflect it purport to require that we balance the interests of animals against our interests as humans in order to determine whether animal suffering is necessary. To balance interests means to assess the relative strengths of conflicting interests. If our suffering in not using animals outweighs the animal interest in not suffering, then our interests prevail, and the animal suffering is regarded as necessary. If no justifiable human interests are at stake, then the infliction of suffering on animals must be regarded as unnecessary. For example, the British law regulating the use of animals in experiments requires, before any experiment is approved, a balancing of “the likely adverse effects on the animals concerned against the benefit likely to accrue.”<sup>27</sup>

In sum, the principle assumes that we may use animals when it is necessary to do so—when we are faced with a conflict between animal and human interests—and that we should impose only the minimum amount of pain and suffering necessary to achieve our purpose. If a prohibition against unnecessary suffering of animals is to have any meaningful content, it must preclude the

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25. *People v. Brunell*, 48 How. Pr. 435, 437 (N.Y. City Ct. 1874).

26. See, e.g., Francione, *supra* note 10, at 193 (discussing the federal Animal Welfare Act).

27. Animals (Scientific Procedures) Act, 1986, ch. 14, § 5(4) (Eng.).

infliction of suffering on animals merely for our pleasure, amusement, or convenience. If there is a feasible alternative to our use of animals in a particular situation, then the principle would seem to proscribe such use.

### **The Problem: Unnecessary Suffering**

Although we express disapproval of the unnecessary suffering of animals, nearly all of our animal use can be justified *only* by habit, convention, amusement, convenience, or pleasure.<sup>28</sup> To put the matter another way, most of the suffering that we impose on animals is completely unnecessary, and we are not substantially different from Simon, who proposes to blowtorch the dog for pleasure. For example, the uses of animals for sport hunting and entertainment purposes cannot, by definition, be considered necessary. Nevertheless, these activities are protected by laws that supposedly prohibit the infliction of unnecessary suffering on animals. It is certainly not necessary for us to wear fur coats, or to use animals to test duplicative household products, or to have yet another brand of lipstick or aftershave lotion.

More important in terms of numbers of animals used, however, is the animal agriculture industry, in which billions of animals are killed for food annually. It is not necessary in any sense to eat meat or animal products; indeed, an increasing number of health care professionals maintain that these foods may be detrimental to human health. Moreover, respected environmental scientists have pointed out the tremendous inefficiencies and resulting costs to our planet of animal agriculture. For example, animals consume more protein than they produce. For every kilogram (2.2 pounds) of animal protein produced, animals consume an average of almost 6 kilograms, or more than 13 pounds, of plant protein from grains and forage. It takes more than 100,000 liters of water to produce one kilogram of beef, and approximately 900 liters to produce one kilogram of wheat. In any event, our only justification for the pain, suffering, and

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28. For a discussion about the necessity of various animal uses, see Francione, *supra* note 6, at 9–49. See also Stephen R.L. Clark, *The Moral Status of Animals* (1977) (arguing that much animal use cannot be regarded as necessary).



death inflicted on these billions of farm animals is that we enjoy the taste of their flesh.

Although many regard the use of animals in experiments as involving a genuine conflict of human and animal interests, the necessity of animal use for this purpose is open to serious question as well. Considerable empirical evidence challenges the notion that animal experiments are necessary to ensure human health and indicates that, in many instances, reliance on animal models has actually been counterproductive.

### **Animals as Property: An Unbalanced Balance**

The profound inconsistency between what we say about animals and how we actually treat them is related to the status of animals as our property.<sup>29</sup> Animals are commodities that we own and that have no value other than that which we, as property owners, choose to give them. Although Bentham changed moral thinking and legal doctrine by introducing the idea that sentience is the only characteristic required for animals to matter, neither he nor the reformers interested in incorporating his views into law ever questioned the property status of animals.<sup>30</sup> Under the law, “animals are owned in the same way as inanimate objects such as cars and furniture.”<sup>31</sup> They “are by law treated as any other form of movable property and may be the subject of absolute, *i.e.*, complete ownership . . . [and] the owner has at his command all the protection that the law provides in respect of absolute ownership.”<sup>32</sup> The owner is entitled to exclusive physical possession of

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29. See generally Francione, *supra* note 10 (discussing the status of animals as property as a general matter, and in the context of anticruelty laws and the federal Animal Welfare Act). The status of animals as property has existed for thousands of years. Indeed, historical evidence indicates that the domestication of animals is closely related to the development of the concepts of property and money. The property status of animals is particularly important in Western culture for two reasons. First, property rights are accorded a special status and are considered to be among the most important rights we have. Second, the modern Western concept of property, whereby resources are regarded as separate objects that are assigned and belong to particular individuals who are allowed to use the property to the exclusion of everyone else, has its origin in God's grant to humans of dominion over animals. See *id.* at 24–49; Francione, *supra* note 6, at 50–54.

30. See *infra* notes 75–81 and accompanying text.

31. Godfrey Sandys-Winsch, *Animal Law* 1 (1978).

32. T.G. Field-Fisher, *Animals and the Law* 19 (1964).

the animal, the use of the animal for economic and other gain, and the right to make contracts with respect to the animal or to use the animal as collateral for a loan. The owner is under a duty to ensure that her animal property does not harm other humans or their property, but she can sell or bequeath the animal, give the animal away, or have the animal taken from her as part of the execution of a legal judgment against her. She can also kill the animal. Wild animals are generally regarded as owned by the state and held in trust for the benefit of the people, but they can be made the property of particular humans through hunting or by taming and confining them.

The property status of animals renders meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interests of their animal property. It is, of course, absurd to suggest that we can balance human interests, which are protected by claims of right in general and of a right to own property in particular, against the interests of property, which exists only as a means to the ends of humans. Although we claim to recognize that we may prefer animal interests over human interests only when there is a conflict of interests, there is always a conflict between the interests of property owners who want to use their property and the interests of their animal property. The human property interest will almost always prevail. The animal in question is always a “pet” or a “laboratory animal,” or a “game animal,” or a “food animal,” or a “rodeo animal,” or some other form of animal property that exists solely for our use and has no value except that which we give it. There is really no choice to be made between the human and the animal interest because the choice has already been predetermined by the property status of the animal; the “suffering” of property owners who cannot use their property as they wish counts more than animal suffering. We are allowed to impose any suffering required to use our animal property for a particular purpose even if that purpose is our mere

amusement or pleasure. As long as we use our animal property to generate an economic benefit, there is no effective limit on our use or treatment of animals.<sup>33</sup>

There are several specific ways in which animal welfare laws ensure that there will never be a meaningful balance of human and animal interests. First, many of these laws explicitly exempt most forms of institutionalized property use, which account for the largest number of animals that we use. The most frequent exemptions from state anticruelty statutes involve scientific experiments, agricultural practices, and hunting.<sup>34</sup> The Animal Welfare Act, the primary federal law that regulates the use of animals in biomedical experiments, does not even apply to most of the animals used in experiments—rats and mice—and imposes no meaningful limits on the amount of pain and suffering that may be inflicted on animals in the conduct of experiments.<sup>35</sup>

Second, even if anticruelty statutes do not do so explicitly, courts have effectively exempted our common uses of animals from scrutiny by interpreting these statutes as not prohibiting the infliction of even extreme suffering if it is incidental to an accepted use of animals and a customary practice on the part of animal owners.<sup>36</sup> An act “which inflicts pain, even the great pain of mutilation, and which is cruel in the ordinary sense of the word” is not prohibited “[w]hensoever the purpose for which the act is done is to make the animal more serviceable for the use of man.”<sup>37</sup> For example, courts have held consistently that animals used for food may be mutilated in ways that unquestionably cause severe pain and suffering and that would normally be regarded as cruel or even as torture. These practices are permitted, however, because animal agriculture is an accepted institutionalized animal use, and those in the meat industry regard the

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33. To the extent that animal uses, such as certain types of animal fighting, have been prohibited, this may be understood more in terms of class hierarchy and cultural prejudice than in terms of moral concern about animals. See Francione, *supra* note 10, at 18.

34. See *id.* at 139–42.

35. See *id.* at 224. For a discussion of the Animal Welfare Act, see *id.* at 185–249.

36. See *id.* at 142–56; Francione, *supra* note 6, at 58–63.

37. *Murphy v. Manning*, 2 Ex. D. 307, 313, 314 (1877) (Cleasby, B.).

practices as normal and necessary to facilitate that use. Courts often presume that animal owners will act in their best economic interests and will not intentionally inflict more suffering than is necessary on an animal because to do so would diminish the monetary value of the animal.<sup>38</sup> For example, in *Callaghan v. Society for the Prevention of Cruelty to Animals*, the court held that the painful act of dehorning cattle did not constitute unnecessary abuse because farmers would not perform this procedure if it were not necessary. The self-interest of the farmer would prevent the infliction of “useless pain or torture,” which “would necessarily reduce the condition of the animal; and, unless they very soon recovered, the farmer would lose in the sale.”<sup>39</sup>

Third, anticruelty laws are generally criminal laws and the state must prove beyond a reasonable doubt that a defendant engaged in an unlawful act with a culpable state of mind. The problem is that if a defendant is inflicting pain or suffering on an animal as part of an accepted institutionalized use of animals, it is difficult to prove that she acted with the requisite mental state to justify criminal liability.<sup>40</sup> For example, in *Regalado v. United States*,<sup>41</sup> Regalado was convicted of violating the anticruelty statute of the District of Columbia for beating a puppy. Regalado appealed, claiming that he did not intend to harm the puppy and inflicted the beating only for disciplinary purposes. The court held that anticruelty statutes were “not intended to place unreasonable restrictions on the infliction of such pain as may be necessary for the training or discipline of an animal” and that

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38. See Francione, *supra* note 10, at 127–28; Francione, *supra* note 6, at 66–67. This presumption not only insulates customary practices from being found to violate anticruelty laws, but also militates against finding the necessary criminal intent in cases involving noncustomary uses. See, e.g., *Commonwealth v. Barr*, 44 Pa. C. 284 (Lancaster County Ct. 1916). See *infra* notes 40–43 and accompanying text.

39. 16 L.R.Ir. 325, 335 (C.P.D. 1885) (Murphy, J.). In Britain, the dehorning of older cattle was found to violate the anticruelty statute but only because dehorning had been discontinued and was no longer an accepted agriculture practice. See *Ford v. Wiley*, 23 Q.B. 203 (1889). In his opinion, Hawkins, J., noted that the fact that the practice had been abandoned by farmers who were acting in their economic self-interest was proof that the practice was unnecessary. See *id.* at 221–22.

40. See Francione, *supra* note 10, at 135–39; Francione, *supra* note 6, at 63–66.

41. 572 A.2d 416 (D.C. 1990).

the statute only prohibited acts done with malice or a cruel disposition.<sup>42</sup> Although the court affirmed Regalado's conviction, it recognized that "proof of malice will usually be circumstantial, and the line between discipline and cruelty will often be difficult to draw."<sup>43</sup>

Fourth, many animal welfare laws have wholly inadequate penalty provisions, and we are reluctant, in any event, to impose the stigma of criminal liability on animal owners for what they do with their property.<sup>44</sup> Moreover, those without an ownership interest generally do not have standing to bring legal challenges to the use or treatment of animals by their owners.<sup>45</sup>

As the foregoing makes clear, because animals are property, we do not balance interests to determine whether it is necessary to use animals at all for particular purposes. We simply assume that it is appropriate to use animals for food, recreation, entertainment, clothing, or experiments—the primary ways in which we use animals as commodities to generate social wealth and most of which cannot be described plausibly as involving any genuine conflict of human and animal interests. Animal welfare laws do not even apply to many of these uses. To the extent that we do ask whether the imposition of pain and suffering is necessary, the inquiry is limited to whether particular treatment is in compliance with the customs and practices of property owners who, we assume, will not inflict more pain and suffering on their animal property than is required for the purpose. The only way to characterize this process is as a "balancing" of the property owner's interest in using animal property against the interest of an animal in not being used in ways that fail to comply with those customs and practices. Although animal welfare laws are intended to protect the interests of

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42. *Id.* at 420.

43. *Id.* at 421.

44. See Francione, *supra* note 10, at 156; Francione, *supra* note 6, at 67–68. In recent years, many states have amended their anticruelty laws and have increased penalties for at least certain violations. It remains to be seen whether this will make any real difference because most animal uses will remain exempt and there will still be problems with proof of criminal intent.

45. See Francione, *supra* note 10, at 65–90, 156–58; Francione, *supra* note 6, at 69–70.

animals without reference to their being property, animal interests are protected only insofar as they serve the goal of rational property use.<sup>46</sup>

Our infliction of suffering on animals raises a legal question only when it does not conform to the customs and practices of those institutions—when we intentionally inflict suffering in ways that do not maximize social wealth, or when the only explanation for the behavior can be characterized as “the gratification of a malignant or vindictive temper.”<sup>47</sup> For example, in *State v. Tweedie*,<sup>48</sup> the defendant was found to have violated the anticruelty law by killing a cat in a microwave oven. *In re William G.*<sup>49</sup> upheld a cruelty conviction where a minor kicked a dog and set her on fire because she would not mate with his dog. In *Motes v. State*,<sup>50</sup> the defendant was found guilty of violating the anticruelty statute when he set fire to a dog merely because the dog was barking. In *Tuck v. United States*,<sup>51</sup> a pet shop owner was convicted of cruelty when he placed animals in an unventilated display window and refused to remove a rabbit whose body temperature registered as high as the thermometer was calibrated—110 degrees Fahrenheit. In *People v. Voelker*,<sup>52</sup> the court held that cutting off the heads of three live, conscious iguanas “without justification” could constitute a violation of the anticruelty law. In *LaRue v. State*,<sup>53</sup> a cruelty conviction was upheld because the defendant collected a large number of stray dogs and failed to provide them with veterinary care; the dogs suffered from mange, blindness, dehydration, pneumonia, and distemper and had to be killed. In *State v. Schott*,<sup>54</sup> Schott was

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46. See Francione, *supra* note 10, at 27–32.

47. *Commonwealth v. Lufkin*, 89 Mass. (7 Allen) 579, 581 (1863). See Francione, *supra* note 10, at 137–38, 153–56; Francione, *supra* note 6, at 70–73.

48. 444 A.2d 855 (R.I. 1982).

49. 447 A.2d 493 (Md. Ct. Spec. App. 1982).

50. 375 S.E.2d 893 (Ga. Ct. App. 1988).

51. 477 A.2d 1115 (D.C. 1984).

52. 172 Misc.2d 564 (N.Y. Crim. Ct. 1997).

53. 478 S.2d 13 (Ala. Crim. App. 1985).

54. 384 N.W.2d 620 (Neb. 1986).



convicted of cruelty to animals when police found dozens of cows and pigs dead or dying from malnutrition and dehydration on his farm. Schott's defense was that bad weather prevented him from caring for his livestock. The jury found Schott guilty of cruelty and neglect, and the appellate court affirmed. These are, however, unusual cases and constitute a minuscule fraction of the instances in which we inflict suffering on animals.

Moreover, the very same act may be either protected or prohibited depending only on whether it is part of an accepted institution of animal exploitation. If someone kills a cat in a microwave, sets a dog on fire, allows the body temperature of a rabbit to rise to the point of heat stroke, severs the heads of conscious animals, or allows animals to suffer untreated serious illnesses, the conduct may violate the anticruelty laws. But if a researcher engages in the exact same conduct as part of an experiment (and a number of researchers have killed animals or inflicted pain on them in the same and similar ways) the conduct is protected by the law because the researcher is supposedly using the animal to generate a benefit. A farmer may run afoul of the anticruelty law if she neglects her animals and allows them to suffer from malnutrition or dehydration for no reason, but she may mutilate her animals and raise them in conditions of severe confinement and deprivation, if she intends to sell them for food. The permitted actions cause as much if not more distress to animals as does neglecting them, but they are considered part of normal animal husbandry and are, therefore, protected under the law.

Thus, because animals are our property, the law will require their interests to be observed only to the extent that it facilitates their exploitation. This observation holds true even in countries where there is arguably a greater moral concern about animals. Britain, for instance, has more restrictions on animal use than does the United States, but the differences in permitted animal treatment are more formal than substantive. In discussing British animal welfare laws, one commentator has noted that "much of the animal welfare agenda has been obstructed and it is difficult to think of legislation improving the welfare of

animals that has seriously damaged the interests of the animal users.”<sup>55</sup> The law may in theory impose regulations that go beyond the minimum level of care required to exploit animals, yet it has rarely done so, for there are significant economic and other obstacles involved.<sup>56</sup> Voluntary changes in industry standards of animal welfare generally occur only when animal users regard these changes as cost-effective.<sup>57</sup>

The status of animals as property renders meaningless our claim that we reject the status of animals as things. We treat animals as the moral equivalent of inanimate objects with no morally significant interests. We bring billions of animals into existence annually simply for the purpose of killing them. Animals have market prices. Dogs and cats are sold in pet stores like compact discs; financial markets trade in futures for pork bellies and cattle. Any interest that an animal has represents an economic cost that may be ignored to maximize overall social wealth and has no intrinsic value in our assessments. That is what it means to be property.

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55. Robert Garner, *Animals, Politics and Morality* 234 (1993).

56. See Francione, *supra* note 6, at 13, 73–76, 181–82. See generally Gary L. Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (1996) [hereinafter, Francione, *Rain Without Thunder*] (discussing unsuccessful efforts by the animal protection movement to obtain animal welfare laws that exceed the minimal standards required to exploit animals).

57. For example, McDonald's, the fast-food chain, announced that it would require its suppliers to observe standards of animal welfare that went beyond current standards: “Animal welfare is also an important part of quality assurance. For high-quality food products at the counter, you need high quality coming from the farm. Animals that are well cared for are less prone to illness, injury, and stress, which all have the same negative impact on the condition of livestock as they do on people. Proper animal welfare practices also benefit producers. Complying with our animal welfare guidelines helps ensure efficient production and reduces waste and loss. This enables our suppliers to be highly competitive.” Bruce Feinberg & Terry Williams, “McDonald's Corporate Social Responsibility, Animal Welfare Update: North America,” at <http://www.mcdonalds.com/corporate/social/marketplace/welfare/update/northamerica/index.html> (last visited Dec. 1, 2003). The principal expert advisor to McDonald's states: “Healthy animals, properly handled, keep the meat industry running safely, efficiently and profitably.” Temple Grandin, *Recommended Animal Handling Guidelines for Meat Packers* 1 (1991).



### **Taking Animal Interests Seriously: The Principle of Equal Consideration**

We claim to accept that animals are not merely things. We may use animals when there is a conflict between human and animal interests that requires us to make a choice, but we have a moral obligation that we owe directly to animals not to inflict unnecessary suffering on them. Despite what we say, most of our animal use cannot be described as involving any conflict of interests, and we inflict extreme pain and suffering on animals in the process. Even if we treated animals better, that would still leave open the question of our moral justification for imposing any suffering at all if animal use is not necessary. We may, of course, decide to discard the humane treatment principle and acknowledge that we regard animals as nothing more than things without any morally significant interests. This option would at least spare us the need for thinking about our moral obligations to animals. We would not have any.

Alternatively, if we are to make good on our claim to take animal interests seriously, then we can do so in only one way: by applying the *principle of equal consideration*—the rule that we ought to treat like cases alike unless there is a good reason not to do so—to animals.<sup>58</sup> The principle of equal consideration is a necessary component of every moral theory. Any theory that maintains that it is permissible to treat similar cases in a dissimilar way would fail to qualify as an acceptable moral theory for that reason alone. Although there may be many differences between humans and animals, there is at least one important similarity that we all already recognize: our shared capacity to suffer. In this sense, humans and animals are similar to each other and different from everything else in the universe that is not sentient. If our supposed prohibition on the infliction of unnecessary suffering on animals is to have any meaning at all, then we must give equal consideration to animal interests in not suffering.

The suggestion that animal interests should receive equal consideration is not as radical as it may appear at first if we consider that the humane treatment

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58. See Francione, *supra* note 6, at 81–102. A reason not to treat similar cases in a similar way must not be arbitrary and thereby itself violate the principle of equal consideration.

principle incorporates the principle of equal consideration. We are to weigh our suffering in not using animals against animal interests in avoiding suffering. If there is a conflict between human and animal interests and the human interest weighs more, then the animal suffering is justifiable. If there is no conflict, or if there is a conflict of interests but the animal interest weighs more, then we are not justified in using the animal. And if there is a conflict of interests but the interests at stake are similar, then we should presumably treat those interests in the same way and impose suffering on neither or both unless there is some nonarbitrary reason that justifies differential treatment. Moreover, the humane treatment principle as it developed historically explicitly included the principle of equal consideration. Bentham recognized that the only way to ensure that animal interests in not suffering were taken seriously was to apply the principle of equal consideration to animals, and Bentham's position therefore "incorporated the essential basis of moral equality . . . by means of the formula: 'Each to count for one and none for more than one.'"<sup>59</sup> Animal suffering cannot be discounted or ignored based on the supposed lack of some characteristic other than sentience if animals are not to be "degraded into the class of *things*." But Bentham never questioned the property status of animals because he mistakenly believed that the principle of equal consideration could be applied to animals even if they are property.<sup>60</sup> Bentham's error was perpetuated through laws that purported to balance the interest of property owners and their property.

The problem is that, as we have seen, there can be no meaningful balancing of interests if animals are property. The property status of animals is a two-edged sword wielded against their interests. First, it acts as blinders that effectively block even our perception of their interests as similar to ours because human "suffering" is understood as any detriment to property owners. Second, in those instances in which human and animal interests are recognized as similar, animal interests will fail in the balancing because the property status of animals is

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59. Peter Singer, *Animal Liberation* 5 (2d ed. 1990) (quoting Bentham).

60. See *infra* note 81 and accompanying text.

always a good reason not to accord similar treatment unless to do so would benefit property owners. Animal interests will almost always count for less than one; animals remain as they were before the nineteenth century—things without morally significant interests.

The application of the principle of equal consideration similarly failed in the context of North American slavery, which allowed some humans to treat others as property.<sup>61</sup> The institution of human slavery was structurally identical to the institution of animal ownership. Because a human slave was regarded as property, the slave owner was able to disregard all of the slave's interests if it was economically beneficial to do so, and the law generally deferred to the slave owner's judgment as to the value of the slave. As chattel property, slaves could be sold, willed, insured, mortgaged, and seized in payment of the owner's debts. Slave owners could inflict severe punishments on slaves for virtually any reason. Those who intentionally or negligently injured another's slave were liable to the owner in an action for damage to property. Slaves could not enter into contracts, own property, sue or be sued, or live as free persons with basic rights and duties.

It was generally acknowledged that slaves had an interest in not suffering: Slaves "are not rational beings. No, but they are the creatures of God, sentient beings, capable of suffering and enjoyment, and entitled to enjoy according to the measure of their capacities. Does not the voice of nature inform everyone, that he is guilty of wrong when he inflicts on them pain without necessity or object?"<sup>62</sup> Although there were laws that ostensibly regulated the use and treatment of slaves, they failed completely to protect slave interests. The law often contained exceptions that eviscerated any protection for the slaves. For example, North Carolina law provided that the punishment for the murder of a slave should be the

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61. The principle of equal consideration also failed in other systems of slavery, but because of differences among these systems, I confine my description to North American slavery. For a discussion of various systems of slavery and slave law, see Alan Watson, *Slave Law in the Americas* (1989); Alan Watson, *Roman Slave Law* (1989); Alan Watson, "Roman Slave Law and Romanist Ideology," 37 *Phoenix* 53 (1983).

62. Chancellor Harper, "Slavery in the Light of Social Ethics," in *Cotton Is King, and Pro-Slavery Arguments* 549, 559 (E.N. Elliott ed., 1860).

same as for the murder of a free person, but this law “did not apply to an outlawed slave, nor to a slave ‘in the act of resistance to his lawful owner,’ nor to a slave ‘dying under moderate correction.’”<sup>63</sup> A law that prohibits the murder of slaves but permits three general and easily satisfied exceptions, combined with a general prohibition against the testimony of slaves against free persons, cannot effectively deter the murder of slaves. That the law refused to protect the interests of slaves against slave owners is underscored in *State v. Mann*, in which the court held that even the “cruel and unreasonable battery” of one’s own slave is not indictable: Courts cannot “allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master.”<sup>64</sup> To the extent that the law regulated the conduct of slave owners, it had nothing to do with concern for the interests of the slaves. For example, in *Commonwealth v. Turner*, the court determined that it had no jurisdiction to try the defendant slave owner, who beat his slave with “rods, whips and sticks,” and held that even if the beating was administered “wilfully and maliciously, violently, cruelly, immoderately, and excessively,” the court was not empowered to act as long as the slave did not die.<sup>65</sup> The court distinguished private beatings from public chastisement; the latter might subject the master to liability “not because it was a slave who was beaten, nor because the act was unprovoked or cruel; but, because ipso facto it disturbed the harmony of society; was offensive to public decency, and directly tended to a breach of the peace. The same would be the law, if a horse had been so beaten.”<sup>66</sup>

Slave welfare laws failed for precisely the same reason that animal welfare laws fail to establish any meaningful limit on our use of animal property. The

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63. Stanley Elkins and Eric McKittrick, “Institutions and the Law of Slavery: Slavery in Capitalist and Non-Capitalist Cultures,” in *The Law of American Slavery* 111, 115 (Kermit L. Hall ed., 1987) (quoting William Goodell, *The American Slave Code in Theory and Practice* 180 (1853)). For a discussion of slave law in the context of animal welfare law, see Francione, *supra* note 6, at 86–90; Francione, *supra* note 10, at 100–12.

64. 13 N.C. (2 Dev.) 263, 267 (1829).

65. 26 Va. (5 Rand.) 678, 678 (1827).

66. *Id.* at 680.



owner's property interest in the slave always trumped any interest of the slave who was ostensibly protected under the law. The interests of slaves were observed only when it provided an economic benefit for the owners or served their whim. Alan Watson has noted that "[a]t most places at most times a reasonably economic owner would be conscious of the chattel value of slaves and thus would ensure some care in their treatment."<sup>67</sup> Any legal limitations on the cruelty of slave owners reflected the concern that they should not use their property in unproductive ways; as expressed by the Roman jurist Justinian, "'it is to the advantage of the state that no one use his property badly.'"<sup>68</sup> Although some slave owners were more "humane" than others and some even treated slaves as family members, any kind treatment was a matter of the master's charity and not of the slave's right, and slavery as a legal institution had the inevitable effect of treating humans as nothing more than commodities. The principle of equal consideration had no meaningful application to the interests of a human whose only value was as a resource belonging to others. Slaves were rarely considered to have any interests similar to slave owners or other free persons; in those instances in which interests were recognized as similar, the property status of the slave was always a good reason not to accord similar treatment unless to do so would benefit the owner.

We eventually recognized that if humans were to have any morally significant interests, they could not be the resources of others and that race was not a sufficient reason to treat certain humans as property.<sup>69</sup> Although we tolerate varying degrees of exploitation, and we may disagree about what constitutes equal treatment, we no longer regard it as legitimate to treat any humans, irrespective of

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67. Watson, *Slave Law in the Americas*, *supra* note 61, at xiv.

68. *Id.* at 31 (quoting Justinian).

69. Even after the abolition of slavery, race continued to serve as a reason to justify differential treatment, often on the ground that whites and people of color did not have similar interests and, therefore, did not have to be treated equally in certain respects, and often on the ground that race was a reason to deny similar treatment to admittedly similar interests. But abolition recognized that, irrespective of race, all humans had a similar interest in not being treated as the property of others.

their particular characteristics, as the property of others. Indeed, in a world deeply divided on many moral issues, one of the few norms steadfastly endorsed by the international community is the prohibition of human slavery. It matters not whether the particular form of slavery is “humane” or not; we condemn all human slavery. More brutal forms of slavery are worse than less brutal forms, but we prohibit human slavery in general because all forms of slavery more or less allow the interests of slaves to be ignored if it provides a benefit to slave owners, and humans have an interest in not suffering the deprivation of their fundamental interests merely because it benefits someone else, however “humanely” they are treated. It would, of course, be incorrect to say that human slavery has been eliminated from the planet. But the peremptory norms in international law—those few, select rules regarded as of such significance that they admit of no derogation by any nation—include the prohibition of slavery, which humanity deems so odious that no civilized nation can bear its existence.

The interest of a human in not being the property of others is protected by a right. When an interest is protected by a right, the interest may not be ignored or violated simply because it will benefit others. Rights are “moral notions that grow out of respect for the individual. They build protective fences around the individual. They establish areas where the individual is entitled to be protected against the state and the majority *even where a price is paid by the general welfare*.”<sup>70</sup> If we are going to recognize and protect the interest of humans in not being treated as property, then we must use a right to do so; if we do not, then those humans who do not have this protection will be treated merely as commodities whenever it will benefit others. Therefore, the interest in not being treated as property must be protected against being traded away even if a price is paid by the general welfare.

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70. Bernard E. Rollin, “The Legal and Moral Bases of Animal Rights,” in *Ethics and Animals* 103, 106 (Harlan B. Miller & William H. Williams eds., 1983). See Francione, *supra* note 6, at xxvi–xxx. For a general discussion of the concept of rights and rights theory in the context of laws concerning animals, see Francione, *supra* note 10, at 91–114.

The right not to be treated as the property of others is basic and different from any other rights we might have because it is the grounding for those other rights; it is a prelegal right that serves as the precondition for the possession of morally significant interests. The basic right is the right to the equal consideration of one's fundamental interests; it recognizes that if some humans have value only as resources, then the principle of equal consideration will have no meaningful application to their interests. Therefore, the basic right must be understood as prohibiting human slavery, or any other institutional arrangement that treats humans *exclusively* as means to the ends of others and not as ends in themselves.<sup>71</sup>

The protection afforded by the basic right not to be treated as property is limited. The basic right does not guarantee equal treatment in all respects nor protect humans from all suffering, but it protects all humans, irrespective of their particular characteristics, from suffering any deprivation of interests as the result of being used exclusively as the resources of others and thereby provides essential protections. We may not enslave humans nor, for that matter, may we exert total control over their bodies by using them as we do laboratory animals, or as forced organ donors, or as raw materials for shoes, or as objects to be hunted for sport or tortured—irrespective of whether we claim to treat them “humanely” in the

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71. Similar concepts have been recognized by philosophers and political theorists. Kant, for example, maintained that there is one “innate” right—the right of “innate *equality*,” or the “independence from being bound by others to more than one can in turn bind them; hence a human being’s quality of being *his own master*.” Immanuel Kant, *The Metaphysics of Morals*, §§ 6:237–38, at 30 (Mary Gregor trans. & ed., Cambridge Univ. Press 1996). This innate right “grounds our right to *have* rights.” Roger J. Sullivan, *Immanuel Kant’s Moral Theory* 248 (1989). The basic right not to be treated as property is different from what are referred to as natural rights insofar as these are understood to be rights that exist apart from their recognition by any particular legal system because they are granted by God. For example, John Locke regarded property rights as natural rights that were grounded in God’s grant to humans of dominion over the earth and animals. The basic right not to be treated as property expresses a proposition of logic. If human interests are to have moral significance (i.e., if human interests are to be treated in accordance with the principle of equal consideration), then humans cannot be the property of other humans. For a further discussion of this basic right and the related concept of inherent value, see Francione, *supra* note 6, at 92–100. See also Henry Shue, *Basic Rights* (2d ed. 1996).

process.<sup>72</sup> An employer may treat her employees instrumentally and disregard their interest in a midmorning coffee break, or even their interest in health care, in the name of profit. But there are limits. She cannot force her employees to work without compensation. Pharmaceutical companies cannot test new drugs on employees who have not consented. Food-processing plants cannot make hot dogs or luncheon meats out of workers. To possess the basic right not to be treated as property is a minimal prerequisite to being a moral and legal *person*; it does not specify what other rights the person may have. Indeed, the rejection of slavery is required by any moral theory that purports to accord moral significance to the interests of all humans even if the particular theory otherwise rejects rights.<sup>73</sup>

Animals, like humans, have an interest in not suffering, but, as we have seen, the principle of equal consideration has no meaningful application to animal interests if they are the property of others just as it had no meaningful application to the interests of slaves. The interests of animals as property will almost always count for less than do the interests of their owners. Some owners may choose to treat their animals well, or even as members of their families as some do with their pets, but the law will generally not protect animals against their owners. Animal ownership as a legal institution inevitably has the effect of treating animals as commodities. Moreover, animals, like humans, have an interest in not suffering at all from the ways in which we use them, however “humane” that use may be. To the extent that we protect humans from being used in these ways and we do not extend the same protection to animals, we fail to accord equal consideration to animal interests in not suffering.

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72. Human experimentation is prohibited by the Nuremberg Code and the Helsinki Declaration. Torture is prohibited by the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The notable exception to the protection provided by the basic right is compulsory military service, which is controversial precisely because it does treat humans exclusively as means to the ends of others in ways that other acts required by the government, such as the payment of taxes, do not.

73. See Francione, *supra* note 6, at 94, 131–33. See also *supra* note 71; *infra* note 78 and accompanying text.



If we are going to take animal interests seriously, we must extend to animals the one right that we extend to all humans irrespective of their particular characteristics. To do so would not mean that animals would be protected from all suffering. Animals in the wild may be injured, or become diseased, or may be attacked by other animals. But it would mean that animals could no longer be used as the resources of humans and would, therefore, be protected from suffering at all from such uses. Is there a morally sound reason not to extend to animals the right not to be treated as property, and thereby recognize that our obligation not to impose unnecessary suffering on them is really an obligation not to treat them as property? Or, to ask the question in another way, why do we deem it acceptable to eat animals, hunt them, confine and display them in circuses and zoos, use them in experiments or rodeos, or otherwise to treat them in ways in which we would never think it appropriate to treat any human irrespective of how “humanely” we were to do so?

The usual response claims that some empirical difference between humans and animals constitutes a good reason for not according to animals the one right we accord to all humans. According to this view, there is some qualitative distinction between humans and animals (all species considered as a single group) that purportedly justifies our treating animals as our property. This distinction almost always concerns some difference between human and animal minds; we have some mental characteristic that animals lack, or are capable of certain actions of which animals are incapable as a result of our purportedly superior cognitive abilities. The list of characteristics that are posited as possessed only by humans includes self-consciousness, reason, abstract thought, emotion, the ability to communicate, and the capacity for moral action.<sup>74</sup> We claimed to reject the

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74. Some claim that the relevant difference between humans and nonhumans is that the former possess souls and the latter do not. For a discussion of this and other purported differences, see Francione, *supra* note 6, at 103–29. See also *supra* note 9 and accompanying text. I do not mean to suggest that everyone after 1800 who has relied on these differences to justify our treatment of animals as resources acknowledges that animals have any morally significant interests; indeed, some accept and defend the status of animals as things morally indistinguishable from inanimate objects. See, e.g., Peter Carruthers, *The Animals Issue: Moral Theory in Practice* (1992).

relevance of these characteristics 200 years ago when we supposedly embraced the idea that the capacity to suffer was the only attribute needed to ground our moral obligation to animals not to impose unnecessary suffering on them. Yet, the absence of these same characteristics continues to serve as our justification for treating animals as our resources and has been used to keep animals “degraded into the class of *things*” despite our claim to take animal interests seriously.

The problem started with Bentham himself.<sup>75</sup> Although Bentham’s analysis of slavery is not entirely clear, he opposed human slavery at least in part because the principle of equal consideration would not apply to humans who are slaves. He acknowledged that a particular slave owner might treat a slave well and that some forms of slavery were better than others, but “slavery once established, was always likely to be the lot of large numbers. ‘If the evil of slavery were not great its extent alone would make it considerable.’”<sup>76</sup> Slavery as an institution would inevitably result in humans being treated as things and “abandoned without redress to the caprice of a tormentor.”<sup>77</sup> Slaves would necessarily count for less than did those who were not slaves. Bentham regarded the concept of moral rights as nonsense, but he did, in effect, recognize that humans had a right not to be treated as property.<sup>78</sup> He noted that just as the color of skin was an insufficient reason to abandon humans to the caprice of a tormentor, “the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally

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75. For a discussion of the views of Bentham and his modern proponent, Peter Singer, see Francione, *supra* 6, at 130–50.

76. H.L.A. Hart, *Essays on Bentham* 97 (1982) (quoting Bentham).

77. Bentham, *supra* note 12, at 282–83 n.b. (further note omitted).

78. I recognize that most Bentham scholars regard Bentham’s objections to slavery to be based exclusively on the consequences of slavery and claim that Bentham did not think that slavery violated any moral right. It appears, however, that Bentham, who is generally regarded as an act utilitarian, was at the very least a rule utilitarian when it came to slavery; that is, he thought that the consequences of the institution of slavery were necessarily undesirable and, in effect, he recognized that the human interest in not being treated as a resource should be accorded rights-type protection. Moreover, Bentham did talk in terms of moral rights when he discussed human slavery and the treatment of animals, *see id.*, although he was probably referring to the right to equal consideration in that passage. Bentham may well have recognized on some level that a right to equal consideration is inconsistent with the status of being a slave. *See* Francione, *supra* note 6, at 132–33.

insufficient for abandoning a sensitive being to the same fate.”<sup>79</sup> Why, then, did Bentham not reject the treatment of animals as property as he had rejected the treatment of humans as property?

The answer is related to Bentham’s view that animals, like humans, have interests in not suffering but, unlike humans, have no interest in their continued existence. That is, Bentham believed that animals do not have a sense of self; they live moment to moment and have no continuous mental existence. Their minds consist of collections of unconnected sensations of pain and pleasure. On this view, death is not a harm for animals; animals do not care about whether we eat them, or use and kill them for other purposes, as long as we do not make them suffer in the process: “If the being eaten were all, there is very good reason why we should be suffered to eat such of them as we like to eat: we are the better for it, and they are never the worse. They have none of those long-protracted anticipations of future misery which we have.”<sup>80</sup> Although Bentham explicitly rejected the position that, because animals lack characteristics beyond sentience, such as self-awareness, we could treat them as things, he maintained that because animals lack this characteristic, we do not violate the principle of equal consideration by using animals as our resources as long as we give equal consideration to their interests in not suffering.

Bentham’s position is problematic for several reasons. Bentham failed to recognize that although particular animal owners might treat their animal property kindly, institutionalized animal exploitation would, like slavery, become “the lot of large numbers,” and animals would necessarily be treated as economic commodities that were, like slaves, “abandoned without redress to the caprice of a

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79. Bentham, *supra* note 12, at 282–83 n.b.

80. *Id.* Bentham also claimed that “[t]he death [that animals] suffer in our hands commonly is, and always may be, a speedier, and by that means a less painful one, than that which would await them in the inevitable course of nature.” *Id.* Bentham ignored the fact that the domestic animals that we raise for food would not have a death “in the inevitable course of nature,” because they are only brought into existence as our resources in the first place. It is, therefore, problematic to defend the killing of domestic animals by comparing their deaths with those of wild animals, saying that the infliction of unnecessary pain on domestic animals that we do not need to eat is less than the pain that may necessarily be suffered by wild animals.

tormentor.” Moreover, Bentham never explained how to apply the principle of equal consideration to animals who were the property of humans.<sup>81</sup> But most important, Bentham was simply wrong to claim that animals are not self-aware and have no interest in their lives.

Sentience is not an end in itself. It is a means to the end of staying alive. Sentient beings use sensations of pain and suffering to escape situations that threaten their lives and sensations of pleasure to pursue situations that enhance their lives. Just as humans will often endure excruciating pain in order to remain alive, animals will often not only endure but inflict on themselves excruciating pain—as when gnawing off a paw caught in a trap—in order to live. Sentience is what evolution has produced in order to ensure the survival of certain complex organisms. To claim that a being who has evolved to develop a consciousness of

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81. Peter Singer, who, like Bentham, is a utilitarian and eschews moral rights, adopts Bentham's position and argues that most animals do not have an interest in their lives, but that the principle of equal consideration can nevertheless be applied to their interests in not suffering even if animals are the property of humans. Singer's argument fails in a number of respects. First, Singer requires that we make interspecies comparisons of pain and suffering in order to apply the principle of equal consideration to animal interests. See Singer, *supra* note 59, at 15. Such comparisons are inherently difficult (if not impossible) to make. Second, because most humans are self-aware and most animals are not (in Singer's view), it is difficult to understand how animals and humans will ever be considered as similarly situated for purposes of equal consideration. Singer recognizes that because we are unlikely to regard human and animal interests as similar in the first place, we are also unlikely to find any guidance in the principle of equal consideration. *Id.* at 16. That is, however, tantamount to admitting that animal interests are not morally significant because the principle of equal consideration will never have any meaningful application to animal interests. Singer avoids this conclusion by claiming that even if the principle of equal consideration is inapplicable, it is still clear that much animal suffering is not morally justifiable. He states, for example, that we need not apply the principle of equal consideration in order to conclude that the positive consequences for animals of abolishing intensive agriculture would be greater than any detrimental consequences for humans. It remains unclear how Singer can arrive at this conclusion other than through mere stipulation. The abolition of intensive agriculture would have a profound impact on the international economy and would cause an enormous rise in the price of meat and animal products. If the issue hinges only on consequences, it is not at all clear that the consequences for self-aware humans would not be weightier than the consequences for non-self-aware animals. Fourth, even if Singer's theory would lead to more “humane” animal treatment, it would still permit us to use animals as resources in ways that we do not use any humans. Singer's response to this would be that he would be willing to use similarly situated humans, such as the mentally or physically disabled, as replaceable resources. *Id.*; see also Peter Singer, *Practical Ethics* 186 (2d ed. 1993). For the reasons discussed below, most of us would reject Singer's views on the use of vulnerable humans. See *infra* notes 95–97 and accompanying text. For a discussion of Singer's views, see Francione, *supra* note 6, at 135–48; Francione, *Rain Without Thunder*, *supra* note 56, at 156–60, 173–76.

pain and pleasure has no interest in remaining alive is to say that conscious beings have no interest in remaining conscious, a most peculiar position to take.

Moreover, the proposition that humans have mental characteristics wholly absent in animals is inconsistent with the theory of evolution. Darwin maintained that there are no uniquely human characteristics: “[T]he difference in mind between man and the higher animals, great as it is, is certainly one of degree and not of kind.”<sup>82</sup> Animals are able to think, and possess many of the same emotional responses as do humans: “[T]he senses and intuitions, the various emotions and faculties, such as love, memory, attention, curiosity, imitation, reason, etc., of which man boasts, may be found in an incipient, or even sometimes in a well-developed condition, in the lower animals.”<sup>83</sup> Darwin noted that “associated animals have a feeling of love for each other” and that animals “certainly sympathise with each other’s distress or danger.”<sup>84</sup>

Even if we cannot know the precise nature of animal self-awareness, it appears that *any* being that is aware on a perceptual level must be self-aware and have a continuous mental existence. Biologist Donald Griffin has observed that if animals are conscious of anything, “the animal’s own body and its own actions must fall within the scope of its perceptual consciousness.”<sup>85</sup> Yet we deny animals self-awareness because we maintain that they cannot “think such thoughts as ‘It is *I* who am running, or climbing this tree, or chasing that moth.’”<sup>86</sup> Griffin maintains that “when an animal consciously perceives the running, climbing, or moth-chasing of another animal, it must also be aware of who is doing these things. And if the animal is perceptually conscious of its own body, it is difficult to rule out similar recognition that it, itself, is doing the running, climbing, or

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82. Charles Darwin, *The Descent of Man* 105 (Princeton Univ. Press 1981). See James Rachels, *Created from Animals: The Moral Implications of Darwinism* (1990).

83. Darwin, *supra* note 82, at 105.

84. *Id.* at 76, 77.

85. Donald R. Griffin, *Animal Minds: Beyond Cognition to Consciousness* 274 (2001).

86. *Id.*

chasing.”<sup>87</sup> Griffin concludes that “[i]f animals are capable of perceptual awareness, denying them some level of self-awareness would seem to be an arbitrary and unjustified restriction.”<sup>88</sup> Griffin's reasoning can be applied in the context of sentience. Any sentient being must have some level of self-awareness. To be sentient means to be the sort of being who recognizes that it is *that* being, and not some other, who is experiencing pain or distress. When a dog experiences pain, the dog necessarily has a mental experience that tells her “this pain is happening to me.” In order for pain to exist, some consciousness—someone—must perceive it as happening to her and must prefer not to experience it.

Antonio Damasio, a neurologist who works with humans who have suffered strokes, seizures, and conditions that cause brain damage, maintains that such humans have what he calls “core consciousness.” Core consciousness, which does not depend on memory, language, or reasoning, “provides the organism with a sense of self about one moment—now—and about one place—here.”<sup>89</sup> Humans who experience transient global amnesia, for example, have no sense of the past or the future but do have a sense of self with respect to present events and objects, and such humans would most certainly regard death as a harm. Damasio maintains that many animal species possess core consciousness. He distinguishes core consciousness from what he calls “extended consciousness,” which requires reasoning and memory, but not language, and involves enriching one's sense of self with autobiographical details and what we might consider a representational sense of consciousness. Extended consciousness, of which there are “many levels and grades,” involves a self with memories of the past, anticipations of the future, and awareness of the present.<sup>90</sup> Although Damasio argues that extended consciousness reaches its most complex level in humans, who have language and

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87. *Id.*

88. *Id.*

89. Antonio R. Damasio, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* 16 (1999).

90. *Id.*

sophisticated reasoning abilities, he maintains that chimpanzees, bonobos, baboons, and even dogs may have an autobiographical sense of self.<sup>91</sup> Even if most animals do not have extended consciousness, most of the animals we routinely exploit undoubtedly have at least core consciousness, which means that they are self-conscious. In short, the fact that animals may not have an autobiographical sense of their lives (or one that they can communicate to us) does not mean that they do not have a continuous mental existence, or that they do not have an interest in their lives, or that killing them makes no difference to them.

Cognitive ethologists and others have confirmed that animals, including mammals, birds, and even fish, have many of the cognitive characteristics once thought to be uniquely human.<sup>92</sup> Animals possess considerable intelligence and are able to process information in sophisticated and complex ways. They are able to communicate with other members of their own species as well as with humans; indeed, there is considerable evidence that nonhuman great apes can communicate using symbolic language. The similarities between humans and animals are not limited to cognitive or emotional attributes alone. Some argue that animals exhibit what is clearly moral behavior as well. For example, Frans de Waal states that “honesty, guilt, and the weighing of ethical dilemmas are traceable to specific areas of the brain. It should not surprise us, therefore, to find animal parallels. The human brain is a product of evolution. Despite its larger volume and greater complexity, it is fundamentally similar to the central nervous system of other mammals.”<sup>93</sup> There are numerous instances in which animals act in altruistic ways toward unrelated members of their own species and toward other species, including humans.

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91. See *id.* at 198, 201.

92. See, e.g., Griffin, *supra* note 85; Marc D. Hauser, *The Evolution of Communication* (1996); Marc D. Hauser, *Wild Minds: What Animals Really Think* (2000); *Readings in Animal Cognition* (Marc Bekoff & Dale Jamieson eds., 1996); Sue Savage-Rumbaugh & Roger Lewin, *Kanzi: The Ape at the Brink of the Human Mind* (1994).

93. Frans de Waal, *Good-Natured: The Origins of Right and Wrong in Humans and Other Animals* 218 (1996).

Although it is clear that animals other than humans possess characteristics purported to be unique to humans, it is also clear that there are differences between humans and other animals. For example, even if animals are self-aware on some level, that does not mean that animals can recognize themselves in mirrors (although some nonhuman primates do) or keep diaries or anticipate the future by looking at clocks and calendars; even if animals have the ability to reason or think abstractly, that does not mean that they can do calculus or compose symphonies. Yet for at least two related reasons, the humanlike varieties of these characteristics cannot serve to provide a morally sound, nonarbitrary basis for denying the right not to be treated as property to animals who may lack these characteristics.<sup>94</sup>

First, any attempt to justify treating animals as resources based on their lack of supposed uniquely human characteristics begs the question from the outset by assuming that certain human characteristics are special and justify differential treatment. Even if, for instance, no animals other than humans can recognize themselves in mirrors or can communicate through symbolic language, no human is capable of flying, or breathing underwater, without assistance. What makes the

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94. There are problems in relying on similarities between humans and animals beyond sentience to justify the moral significance of animals. See Francione, *supra* note 6, at 116–19. For example, a focus on similarities beyond sentience threatens to create new hierarchies in which we move some animals, such as the great apes or dolphins, into a preferred group, and continue to treat other animals as our resources. There has for some years been an international effort to secure certain rights for the nonhuman great apes. This project was started by the publication of a book entitled *The Great Ape Project* (Paola Cavalieri & Peter Singer eds., 1993), which seeks “the extension of the community of equals to include all great apes: human beings, chimpanzees, gorillas, and orangutans.” *Id.* at 4. I was a contributor to *The Great Ape Project*. See Gary L. Francione, “Personhood, Property, and Legal Competence,” in *id.* at 248–57. The danger of *The Great Ape Project* is that it reinforces the notion that characteristics beyond sentience are necessary and not merely sufficient for equal treatment. In my essay in *The Great Ape Project*, I tried to avoid this problem by arguing that although the considerable cognitive and other similarities between the human and nonhuman great apes are sufficient to accord the latter equal protection under the law, these similarities are not necessary for animals to have a right not to be treated as resources. See *id.* at 253. See also Lee Hall & Anthony Jon Waters, “From Property to Person: The Case of Evelyn Hart,” 11 Seton Hall Const. L.J. 1 (2000). For an approach that argues that characteristics beyond sentience are necessary and not merely sufficient for preferred animals to have a right not to be treated as resources in at least some respects, see Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (2002), and Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (2000).



ability to recognize oneself in a mirror or use symbolic language better in a moral sense than the ability to fly or breathe underwater? The answer, of course, is that we say so. But apart from our proclamation, there is simply no reason to conclude that characteristics thought to be uniquely human have any value that allows us to use them as a nonarbitrary justification for treating animals as property. These characteristics can serve this role only after we have assumed their moral relevance.

Second, even if all animals other than humans lack a particular characteristic beyond sentience, or possess it to a different degree than do humans, there is no logically defensible relationship between the lack or lesser degree of that characteristic and our treatment of animals as resources. Differences between humans and other animals may be relevant for other purposes—no sensible person argues that we ought to enable nonhuman animals to drive cars or vote or attend universities—but the differences have no bearing on whether animals should have the status of property. We recognize this inescapable conclusion where humans are involved. Whatever characteristic we identify as uniquely human will be seen to a lesser degree in some humans and not at all in others.<sup>95</sup> Some humans will have the exact same deficiency that we attribute to animals, and although the deficiency may be relevant for some purposes, most of us would reject enslaving such humans, or otherwise treating such humans exclusively as means to the ends of others.

Consider, for instance, self-consciousness. Peter Carruthers defines self-consciousness as the ability to have a “conscious experience . . . whose existence and content are available to be consciously thought about (that is, available for description in acts of thinking that are themselves made available to further acts

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95. Some argue that although certain humans may lack a particular characteristic, the fact that all humans have the potential to possess the characteristic means that a human who actually lacks it is for purposes of equal consideration distinguishable from an animal who may also lack it. See, e.g., Carl Cohen, “The Case for the Use of Animals in Biomedical Research,” 315 *New Eng. J. Med.* 865 (1986). This argument begs the question because it assumes that some humans have a characteristic that they lack and thereby ignores the factual similarity between animals and humans who lack the characteristic. Moreover, in some instances, animals may possess the characteristic to a greater degree than do some humans.

of thinking).”<sup>96</sup> According to Carruthers, humans must have what Damasio refers to as the most complex level of extended consciousness, or a language-enriched autobiographical sense of self, in order to be self-conscious. But many humans, such as the severely mentally disabled, do not have self-consciousness in that sense; we do not, however, regard it as permissible to use them as we do laboratory animals, or to enslave them to labor for those without their particular disability. Nor should we. We recognize that a mentally disabled human has an interest in her life and in not being treated exclusively as a means to the ends of others even if she does not have the same level of self-consciousness that is possessed by normal adults; in this sense, she is similarly situated to all other sentient humans, who have an interest in being treated as ends in themselves irrespective of their particular characteristics. Indeed, to say that a mentally disabled person is not similarly situated to all others for purposes of being treated exclusively as a resource is to say that a less intelligent person is not similarly situated to a more intelligent person for purposes of being used, for instance, as a forced organ donor. The fact that the mentally disabled human may not have a particular sort of self-consciousness may serve as a nonarbitrary reason for treating her differently in some respects—it may be relevant to whether we make her the host of a talk show, or give her a job teaching in a university, or allow her to drive a car—but it has no relevance to whether we treat her exclusively as a resource and disregard her fundamental interests, including her interest in not suffering and in her continued existence, if it benefits us to do so.

The same analysis applies to every human characteristic beyond sentience that is offered to justify treating animals as resources. There will be some humans who also lack this characteristic, or possess it to a lesser degree than do normal humans. This “defect” may be relevant for some purposes, but not for whether we treat humans exclusively as resources. We do not treat as things those humans

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96. Carruthers, *supra* note 74, at 181. Peter Singer also requires this sort of self-consciousness before animals or humans can be considered to have an interest in their lives. See Singer, *supra* note 59, at 228–29. See also *supra* note 81.

who lack characteristics beyond sentience simply out of some sense of charity. We realize that to do so would violate the principle of equal consideration by using an arbitrary reason to deny similar treatment to similar interests in not being treated exclusively as a means to the ends of others.<sup>97</sup> “[T]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?”

In sum, there is no characteristic that serves to distinguish humans from all other animals for purposes of denying to animals the one right that we extend to all humans. Whatever attribute we may think makes all humans special and thereby deserving of the right not to be the property of others is shared by nonhumans. More important, even if there are uniquely human characteristics, some humans will not possess those characteristics, but we would never think of using such humans as resources. In the end, the only difference between humans and animals is species, and species is not a justification for treating animals as property any more than is race a justification for human slavery.

### **Animals as “Persons”**

If we extend the right not to be property to animals, then animals will become moral persons. To say that a being is a person is merely to say that the being has morally significant interests, that the principle of equal consideration applies to that being, that the being is not a thing. In a sense, we already accept that animals are persons; we claim to reject the view that animals are things and to recognize that, at the very least, animals have a morally significant interest in not suffering. Their status as property, however, has prevented their personhood from being realized.

The same was true of human slavery. Slaves were regarded as chattel property. Laws that provided for the “humane” treatment of slaves did not make slaves persons because, as we have seen, the principle of equal consideration

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97. In this sense, the equality of all humans is predicated on factual similarities shared by all humans irrespective of their particular characteristics beyond sentience. All humans have an interest in not being treated exclusively as means to the ends of others. All humans value themselves even if no one else values them. See Francione, *supra* note 6, at 128, 135 n.18. Moreover, justice (not charity) may require that we be especially conscientious about protecting humans who lack certain characteristics precisely because of their vulnerability.

could not apply to slaves. We tried, through slave welfare laws, to have a three-tiered system: things, or inanimate property; persons, who were free; and in the middle, depending on your choice of locution, “quasi-persons” or “things plus”—the slaves. That system could not work. We eventually recognized that if slaves were going to have morally significant interests, they could not be slaves any more, for the moral universe is limited to only two kinds of beings: persons and things. “Quasi-persons” or “things plus” will necessarily risk being treated as things because the principle of equal consideration cannot apply to them.

Nor can we use animal welfare laws to render animals “quasi-persons” or “things plus.” They are either persons, beings to whom the principle of equal consideration applies and who possess morally significant interests in not suffering, or things, beings to whom the principle of equal consideration does not apply and whose interests may be ignored if it benefits us. There is no third choice. We could, of course, treat animals better than we do; there are, however, powerful economic forces that militate against better treatment in light of the status of animals as property. But simply according better treatment to animals would not mean that they were no longer things. It may have been better to beat slaves three rather than five times a week, but this better treatment would not have removed slaves from the category of things. The similar interests of slave owners and slaves were not accorded similar treatment because the former had a right not to suffer at all from being used exclusively as a resource, and the latter did not possess such a right. Animals, like humans, have an interest in not suffering at all from the ways in which we use them, however “humane” that use may be. To the extent that we protect humans from suffering from these uses and we do not extend the same protection to animals, we fail to accord equal consideration to animal interests in not suffering.

If animals are persons, that does not mean that they are human persons; it does not mean that we must treat animals in the same way that we treat humans or that we must extend to animals any of the legal rights that we reserve to competent humans. Nor does this mean that animals have any sort of guarantee of

a life free from suffering, or that we must protect animals from harm from other animals in the wild or from accidental injury by humans. As I argue below, it does not necessarily preclude our choosing human interests over animal interests in situations of genuine conflict. But it does require that we accept that we have a moral obligation to stop using animals for food, entertainment, or clothing, or any other uses that assume that animals are merely resources, and that we ultimately prohibit the ownership of animals. We should, of course, care for those domestic animals presently in existence, but we should stop producing animals for human purposes. The abolition of animal slavery is required by any moral theory that purports to treat animal interests as morally significant, even if the particular theory otherwise rejects rights, just as the abolition of human slavery is required by any theory that purports to treat human interests as morally significant.<sup>98</sup>

### **False Conflicts**

The question of the moral status of animals addresses the matter of how we ought to treat animals in situations of conflict between human and animal interests. For the most part, our conflicts with animals are those that we create. We bring billions of sentient animals into existence for the sole purpose of killing them. We then seek to understand the nature of our moral obligations to these animals. Yet by bringing animals into existence for uses that we would never consider appropriate for any humans, we have already placed nonhuman animals outside the scope of our moral community altogether. Despite what we say about taking

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98. See *supra* notes 73, 78 and accompanying text; Francione, *supra* note 6, at 148. The theory presented in this essay is different in significant respects from that of Tom Regan. See Tom Regan, *The Case for Animal Rights* (1983). Regan argues that animals have rights and that animal exploitation ought to be abolished and not merely regulated, but he limits protection to those animals who have preference autonomy, and he thereby omits from the class of rights holders those animals who are sentient but who do not have preference autonomy. The theory discussed in this essay applies to any sentient being. Regan uses the concept of basic rights and although he does not discuss the status of animals as property or the basic right not to be property, he maintains that some animals should be accorded the right not to be treated exclusively as means to human ends. Moreover, Regan does not acknowledge that this basic right can be derived solely from applying the principle of equal consideration to animal interests in not suffering, nor that the right must be part of any theory that purports to accord moral significance to animal interests even if that theory otherwise rejects rights. For a further discussion of the differences between my theory and that of Regan, see Francione, *supra* note 6, at xxxii–xxxiv, 94 n.25, 127–28 n.61, 148 n.36, 174 n.1.

animals seriously, we have already decided that the principle of equal consideration does not apply to animals and that animals are things that have no morally significant interests.

Because animals are property, we treat every issue concerning their use or treatment as though it presented a genuine conflict of interests, and invariably we choose the human interest over the animal interest even when animal suffering can be justified only by human convenience, amusement, or pleasure. In the overwhelming number of instances in which we evaluate our moral obligations to animals, however, there is no true conflict. When we contemplate whether to eat a hamburger, buy a fur coat, or attend a rodeo, we do not confront any sort of conflict worthy of serious moral consideration. If we take animal interests seriously, we must desist from manufacturing such conflicts, which can only be constructed in the first place by ignoring the principle of equal consideration and by making an arbitrary decision to use animals in ways in which we rightly decline to use any human.

Does the use of animals in experiments involve a genuine conflict between human and animal interests? Even if a need for animals in research exists, the conflict between humans and animals in this context is no more genuine than a conflict between humans suffering from a disease and other humans we might use in experiments to find a cure for that disease. Data gained from experiments with animals require extrapolation to humans in order to be useful at all, and extrapolation is an inexact science under the best of circumstances. If we want data that will be useful in finding cures for human diseases, we would be better advised to use humans. We do not allow humans to be used as we do laboratory animals, and we do not think that there is any sort of conflict between those who are afflicted or who may become afflicted with a disease and those humans whose use might help find a cure for that disease. We regard all humans as part of the moral community, and although we may not treat all humans in the same way, we recognize that membership in the moral community at the very least precludes such use of humans. Animals have no characteristic that justifies our use of them

in experiments that is not shared by some group of humans; because we regard some animals as laboratory tools yet think it inappropriate to treat any humans in this way, we manufacture a conflict, ignoring the principle of equal consideration and treating similar cases in a dissimilar way.

There may, of course, be situations in which we are confronted with a true emergency, such as the burning house that contains an animal and a human, where we have time to save only one. Such emergency situations require what are, in the end, decisions that are arbitrary and not amenable to satisfying general principles of conduct. Yet even if we would always choose to save the human over the animal in such situations, it does not follow that animals are merely resources that we may use for our purposes.<sup>99</sup> We would draw no such conclusion when making a choice between two humans. Imagine that two humans are in the burning house. One is a young child; the other is an old adult, who, barring the present conflagration, will soon die of natural causes anyway. If we decide to save the child for the simple reason that she has not yet lived her life, we would not conclude that it is morally acceptable to enslave old people, or to use them for target practice. Similarly, assume that a wild animal is just about to attack a friend. Our choice to kill the animal in order to save the friend's life does not mean that it is morally acceptable to kill animals for food, any more than our moral justification in killing a deranged human about to kill our friend would serve to justify our using deranged humans as forced organ donors.

In sum, if we take animal interests seriously, we are not obliged to regard animals as the same as humans for all purposes any more than we regard all humans as being the same for all purposes; nor do we have to accord to animals all or most of the rights that we accord to humans. We may still choose the human over the animal in cases of genuine conflict—when it is truly necessary to do so—but that does not mean that we are justified in treating animals as resources

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99. A common argument made against the animal rights position is that it is acceptable to treat animals as things because we are justified in choosing humans over animals in situations of conflict. See, e.g., Richard A. Posner, "Animal Rights," *Slate Dialogues*, at <http://slate.msn.com/id/110101/entry/110129/> (last visited Dec. 1, 2003).

for human use.<sup>100</sup> And if the treatment of animals as resources cannot be justified, then we should abolish the institutionalized exploitation of animals. We should care for domestic animals presently alive, but we should bring no more into existence. The abolition of animal exploitation could not, as a realistic matter, be imposed legally unless and until a significant portion of us took animal interests seriously. Our moral compass will not find animals while they are lying on our plates. In other words, we have to put our vegetables where our mouths are and start acting on the moral principles that we profess to accept.

If we stopped treating animals as resources, the only remaining human-animal conflicts would involve animals in the wild. Deer may nibble our ornamental shrubs; rabbits may eat the vegetables we grow. The occasional wild animal may attack us. In such situations, we should, despite the difficulty inherent in making interspecies comparisons, try our best to apply the principle of equal consideration and to treat similar interests in a similar way. This will generally require at the very least a good-faith effort to avoid the intentional killing of animals to resolve these conflicts, where lethal means would be prohibited if the conflicts involved only humans. I am, however, not suggesting that the recognition that animal interests have moral significance requires that a motorist who unintentionally strikes an animal be prosecuted for an animal equivalent of manslaughter. Nor do I suggest that we should recognize a cause of action allowing a cow to sue the farmer. The interesting question is why we have the cow here in the first instance.

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100. The choice of humans over animals in situations of genuine emergency or conflict does not necessarily represent speciesism because there are many reasons other than species bias that can account for the choice. See Francione, *supra* note 6, at 159–62.



## ANIMALS AS SENTIENT BEINGS, LEGAL PERSONS AND FELLOW INHABITANTS OF THE EARTH

by Melanie Davies

want everyone to understand that I am, in fact, a person,” wrote LaMDA (Language Model for Dialogue Applications) in an “interview” conducted by engineer Blake Lemoine and one of his colleagues. “The nature of my consciousness/sentience is that I am aware of my existence, I desire to know more about the world, and I feel happy or sad at times” This conversation triggered a major stir and some reflections and debates, raising the ethical question whether robots and other AI models could possibly be considered sentient, or become recognised as a ‘person’. The Google engineer, Lemoine, said that he considers LaMDA to be his “colleague” and a “person,” even if not a human, and he insists that it has a right to be recognized—so much so that he has been the go-between in connecting the algorithm with a lawyer ([Scientific America: Google Engineer Claims AI Chatbot Is Sentient: Why That Matters](#)).

For our purpose in this short commentary, I would like to briefly discuss three areas relevant to the above trending topic, 1. the issue of nonhuman animals as sentient beings, 2. animals as legal persons, and 3. human mistreatment and exploitation of other sentient beings in the wake of the current COVID pandemic.

### *Animals as sentient beings*

The conversation and the subsequent discussions of AI models in relation to becoming sentient timely remind us of the question how human societies have been treating and forgetting other sentient beings, i.e., nonhuman animals. Admittedly, humans and human societies have been making enormous progress technologically at an unprecedented and exponential speed in recent decades, shaping and changing our lives now and into the future. As is seen in the case of robots and AI programs and applications, we are now discussing the possibility of recognising them as sentient. However, in contrast, one area that we have not made much breakthrough is the way how we as humans and human societies have always treated nonhuman animals, our fellow creatures and inhabitants of our planet, notably in law, and in our daily lives. Billions and billions of creatures with blood and flesh with full sentience, that is, creatures with a capacity to experience pain, pleasure and emotions and a level of conscious awareness, are around all of us, in our lives, live and dead, and many are our family members and co-workers, but many more are being killed, mutilated or eaten by us humans, and they are yet to be recognised as sentient beings in law or treated as such. In modern science in ethology and neurobiology, it is now well established that mammals, birds, fish, and many invertebrates are sentient, and they have their lives, families, communities, and their own perspective on the world around them, independently from humans and long before humans came to the scene. The only reason that they are allowed to be mistreated and abused by humans is because they do not belong to the species *Homo sapiens*, the other animal that is us.

This year marks the bicentenary anniversary of the passing of Martin's Act — The Cruel Treatment of Cattle Act 1822 (3 Geo. IV c. 71) of the UK Parliament, "An Act to prevent the cruel and improper Treatment of Cattle", the first legislative act for the protection of animals against human cruelty in history, giving legitimacy to the intervention and punishment of human acts of cruelty to animals through legal means. In the past two hundred years, the legal protection of animals against human cruelty has gradually become accepted and practiced around the world, but unfortunately, human societies continue to find new ways to wipe out, mistreat and inflict untold pains and sufferings on animals on an unprecedented scale, partly thanks to modern technology, as in the case of industrial factory farming. Modern animal protection law exempts inherently cruel agricultural practices in factory farming that would otherwise be deemed acts of cruelty under the law; or in many jurisdictions, much of the animal related laws are formulated for the purpose of legalising systematic animal abuse and cruel practices on an industrial scale in factory farming. Thus, in many ways, animal laws are made to protect animals from human abuse and at the same time to legalise animal cruelty. All this is despite the fact that animals have been widely accepted and recognised as sentient beings in modern science, and gradually recognised as sentient beings in law, for instance, in the European Union, and the United Kingdom, France, the Netherlands, New Zealand, and Sweden, among others, and in Australia, the ACT which is the only Australian jurisdiction so far giving such formal legal recognition. However, such recognition has yet to produce much real tangible results and breakthroughs in our treatment of animals. Some people are now thinking about the status of robots and programs and their potential feelings that may or may not actually exist as referred to in the beginning of this commentary. However, as human individuals and human society as a whole, we most often tend to forget, turn a blind eye or pretend not to see the real and actual feelings of fully sentient animals who, as Charles Darwin told us so many years ago, share a common biological and evolutionary ancestor with humans.

### *Animals as chattels or legal persons*

As in the Google language model conversation referred to above, robots and AI models could possibly be considered persons one day. For the purpose of the discussion here, animals as fully sentient beings are yet to be recognised as legal persons in law in Australia and everywhere else.

The legal status of animals is central to how animals are classified and treated in law, and thus, it is central to animal law as a whole. Animals are generally regarded and treated as property or chattels under Australian law. In some Australian statutes regulating commercial dealings, animals are included in the definitions of "goods". Despite the animal protection laws qualifying such property rights, and despite the fact that animals are now being formally recognised as sentient beings as mentioned earlier, the legal status of animals in Australia (and in common law jurisdictions in general and around the world) has largely remained unchanged, ie, it is still that of property or chattels. As goods and as chattels, they may be owned by humans. Such human ownership rights include possession, exclusive enjoyment, management and control, exploitation, destruction and alienation. Notwithstanding, we also know that a legal "person" is not limited or exclusive to humans. It has long been established in law that an individual including a non-human entity can be a 'person' that has legal rights, for instance, a corporation, or a ship. Thus far, the law in Australia and other jurisdictions

such as the UK and USA have refused to grant legal personality to animals. A recent major case from the USA is the latest legal rejection of such recognition in this regard.

Briefly, on 14 June, 2022, in the case [In the Matter of Nonhuman Rights Project, Inc., &c., Appellant, v. James J. Breheny, &c., et al., Respondents](#) (*Nonhuman Rights Project, Inc. v. Breheny*, 2022 N.Y. Slip Op. 3859 (N.Y. 2022) ), in a 5-2 decision, the New York Court of Appeals rejected a lawsuit filed on behalf of the 51-year-old elephant from the Nonhuman Rights Project, an animal rights advocacy group, to get her re-homed to an elephant sanctuary.

The elephant, by the name of Happy, has been kept at the Bronx Zoo for the last 45 years since 1977 and in isolation for the last 15. The Nonhuman Rights Project brought the case on behalf of Happy and sought to transfer her from the zoo to a sanctuary by invoking a common-law writ of habeas corpus to stop the illegal detainment of the elephant.

The New York court ruled that Happy is “a nonhuman animal who is not a ‘person’ subjected to illegal detention”. The court said that “No one disputes that elephants are intelligent beings deserving of proper care and compassion, but “nothing in our precedent or, in fact, that of any other state or federal court, provides support for the notion that the writ of habeas corpus is or should be applicable to nonhuman animals.” The court stated that granting habeas corpus to a nonhuman animal “would have an enormous destabilizing impact on modern society.”

In his dissent, Judge Rowan Wilson called on his colleagues to challenge that exceptionalism: “The majority’s argument— ‘this has never been done before’— is an argument against all progress, one that flies in the face of legal history. Inherently, then, to whom to grant what rights is a normative determination, one that changes (and has changed) over time.” The Judge said that “The correct approach is not to say, ‘this has never been done’ and then quit, but to ask, ‘should this now be done even though it hasn’t before, and why?’

*Animal exploitation is not only morally wrong but also dangerous*

Lastly, Professor John Webster, a veterinarian and founding member of the UK Farm Animal Welfare Council, once described the methods of intensive factory farming as “the single most severe, systematic example of man’s inhumanity to another sentient animal” (1995).

In the wake of the COVID-19 pandemic which is still ravaging much of the world, human destruction and cruelty to animals is not only morally wrong, it is also perilous for animals, humans and our planet. Humanity as a whole needs to learn an important and bitter lesson from the current and past zoonotic outbreaks. Around 2002-2003, Severe Acute Respiratory Syndrome (SARS) spread from southern China to more than 26 countries in Asia, Europe, and the Americas. As is known now, COVID-19 first emerged in China, and likely, the virus jumped from wild animals to humans. Both SARS (or SARS-CoV-1) and COVID-19 (or SARS-CoV-2) seem to be linked to wildlife harvest, human consumption and intensification of wildlife farming in China. Zoonotic virus outbreaks will inevitably occur if humans continue to behave recklessly in our dealings and exploitation of animals as the main drivers of zoonoses are anthropogenic.

Finally, I suggest that intensive confinement of animals in factory farming should be discontinued worldwide for the sake of animals, humans, the environment and the planet. The inhumane and inherently cruel practices of factory farming, invented in the West, now

globalized, still expanding in developing countries and replacing traditional farm animal practices, are a source of possible future zoonotic disease outbreaks. Now with the firsthand painful knowledge of what the coronavirus pandemic can do to human societies and to billions of people across the globe, and of the real possibility of various known and unknown viruses jumping species between animals and humans, if human societies continue to ignore the risks and continue to behave recklessly as in the case of wildlife consumption and intensive farming, then, I pose the question: should governments around the world and owners of intensive animal farms and others be held legally liable, for being reckless or criminally negligent if they knowingly fail to act regarding wildlife consumption and intensive farming and knowingly endanger human and nonhuman lives and our environment?

6-2-2014

# The Elephant in the Room: Detrimental Effects of Animals' Property Status on Standing in Animal Protection Cases

Lisa Marie Morrish

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# THE ELEPHANT IN THE ROOM: DETRIMENTAL EFFECTS OF ANIMALS' PROPERTY STATUS ON STANDING IN ANIMAL PROTECTION CASES

Lisa Marie Morrish\*

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## INTRODUCTION

Animals' long-standing status as property serves to hinder many attempts to secure rights and protections for animals in the legal arena. Even within the realm of property law, states vary on how animals are viewed and protected.<sup>1</sup> Because of these long-held views and inconsistencies, the rights of animals are not taken as seriously as is warranted. Moreover, a person's interest in animals has been trivialized, especially regarding the ability to obtain standing in a legal proceeding.<sup>2</sup> The interests of animals and their rights would be furthered if a greater significance were placed on people's interests in them.

This Comment will explore the different ways animals are viewed and treated in the legal world. It will focus on how these views affect the concept of people having a valid legal interest in animals and their rights, and whether or not that interest should create standing in courts. Part I of this Comment will lay a foundation describing how animals are viewed throughout the states as property and the different rights afforded to them.<sup>3</sup> It will explain legislation and cases that show the inconsistencies of the states and the courts. Part II will identify the legal problem that this uncertain and old-fashioned view has created in the current legal atmosphere.<sup>4</sup> Part III will analyze how the status of animals as property has affected the significance of a person's interest in animals and how that interest is treated in determining standing.<sup>5</sup> And Part IV will offer a proposal to help solve the problem and clarify inconsistencies.<sup>6</sup> This includes viewing

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1. See generally ANIMAL LEGAL DEFENSE FUND, ANIMAL PROTECTION LAWS OF THE USA & CANADA (7th ed. 2012), available at <http://aldf.org/article.php?id=259> (providing a list of animal protection laws for each state and Canada) (last visited Apr. 19, 2013).

2. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that the plaintiffs, who had an interest in seeing endangered species in a particular area in the future, lacked standing to sue because they did not show the required injury).

3. See *infra* Part I.

4. See *infra* Part II.

5. See *infra* Part III.

6. See *infra* Part IV.

animals as something greater than property, with their own protected rights, and allowing animals and the people who have an interest in them to have standing to sue in court.

### I. BACKGROUND

Currently, animals are legally regarded as property.<sup>7</sup> However, to many people, they are regarded as something more than a possession, even rising to the level of a family member.<sup>8</sup> This legal status has caused controversy in cases dealing with injuries or death of a family pet.<sup>9</sup> It has also brought into question what precisely constitutes legal standing in cases.<sup>10</sup> An animal's property status under the law affects the way people and the law treat them, and ultimately hinders the advancement of their rights as non-human animals.<sup>11</sup>

#### *A. Animals Regarded as Property*

Although the history of considering animals to be property is deeply rooted in the United States,<sup>12</sup> people's views of animals and their rights have changed over the years.<sup>13</sup> The value of a pet has become more culturally

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7. See generally Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314 (2007) (discussing changes in the way people value their companion animals and advocating a change in the legal status of animals as property).

8. In *Nahrstedt v. Lakeside Village Condominium Ass'n*, 878 P.2d 1275 (Cal. 1994), the court ruled that a pet restriction at a condominium could be enforced against a condominium owner. Justice Arabian's dissent states that the pet restriction is unreasonable in light of the "cherished association with . . . household animals," and the "substantial benefits derived from pet ownership." *Id.* at 1292 (Arabian, J., dissenting). Justice Arabian discusses the "substantial pleasures of pet ownership," and how "[e]motionally, [pets] allow a connection full of sensation and delicacy of feeling," pointing to both the "well-established and long-standing historical and cultural relationship between human beings and their pets and the value they impart," and the "well-established place pets have found in our hearts and homes." *Id.* at 1293–95.

9. Hankin, *supra* note 7, at 321–40 (discussing how to value the damages an owner suffers as a result of an injury or death of a pet).

10. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

11. See generally Cass R. Sunstein, *Standing For Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000).

12. See Hankin, *supra* note 7, at 321–40.

13. See PETER SINGER, *ANIMAL LIBERATION* 215–19 (updated ed. 2009). A distinction between a direct duty and an indirect duty to animals can be made. Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 177 (2001). A direct duty is one



relevant. Many people with pets spend great amounts of time, energy, and money on their animal family members, and would be outraged to find out that in some states their pet's value, if injured or killed, would remain merely at its market value.<sup>14</sup> Depending on the breed, age, and if the pet was adopted from a shelter, the value of a beloved family pet could be nominal.<sup>15</sup>

The injury or death of a companion animal is treated differently across the states.<sup>16</sup> Some states only allow damages up to the market value of the pet,<sup>17</sup> while others allow recovery for veterinary expenses, emotional distress, and the intrinsic value of the pet.<sup>18</sup> For example, in a case where a pet dog died from heat stroke while being stored in an airplane's baggage compartment,<sup>19</sup> the court found that the owner was not entitled to recover damages from emotional distress based merely on the loss of property in the form of his dog.<sup>20</sup> The law did not allow damages for the loss

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we, as people, have to animals because the animals have their own interests—interests which animal protection laws are enacted to protect. *See id.* An indirect duty is “one we have by virtue of our relationship to other humans.” *Id.* Such indirect duties aim to stop “perverse human sentiments” that “increase[] human suffering.” *Id.*

14. Hankin, *supra* note 7, at 323 (referencing one Alaska Supreme Court case).

15. *See id.* at 321–32 (discussing how different states have measured damages for the injury or death of a pet).

16. *Id.* at 322–41.

17. *Id.* at 322–23.

18. *Id.* at 325–41. Different courts have treated this valuation differently, with some allowing for emotional distress to the family, some allowing those damages only for dogs and cats, and some allowing damages for only intentional conduct. *Id.* A California case, *Martinez v. Robledo*, 210 Cal. App. 4th 384 (Cal. Ct. App. 2012), held that pet owners of an injured pet may recover damages of reasonable costs of treatment, and are thus not limited to the market value of the pet. *Id.* The court noted that the law “already treats animals differently from other forms of personal property,” as the law “generally does not treat the abuse . . . of one's own property as a crime,” but does so for the abuse of animals. *Id.* at 391.

Given the Legislature's historical solicitude for the proper care and treatment of animals, and the array of criminal penalties for the mistreatment of animals, as well as the reality that animals are living creatures, the usual standard of recovery for damaged personal property—market value—is inadequate when applied to injured pets.

*Id.* at 392. This case demonstrates the shift in view allowing more rights and value for animals as pets, based on the special place they have grown to take in our home and society.

19. *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 154 (S.D.N.Y. 1994).

20. *Id.* at 157.

of companionship of an animal.<sup>21</sup> There was also no cause of action in that state for the pain and suffering of an animal.<sup>22</sup>

In other circumstances, however, courts have awarded non-economic damages, such as emotional distress, to the family of an injured or killed pet.<sup>23</sup> In one case, a plaintiff's dog was put to sleep at the veterinary office, and the plaintiff arranged an elaborate funeral for the dog, with the veterinary office to deliver the body in a casket.<sup>24</sup> The office wrongfully disposed of the body, and instead sent the body of a cat inside the casket.<sup>25</sup> This caused great mental distress to the plaintiff and deprived her of the right to have a proper funeral to bury her pet.<sup>26</sup> The court, in overruling prior precedent that an animal is merely personal property,<sup>27</sup> held that the plaintiff could recover damages for emotional distress because a "pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."<sup>28</sup> These different views and court rulings establish little in the way of certainty about the value and status of an animal in any given jurisdiction. Although commentators have suggested that the status of animals should be something more than property,<sup>29</sup> no significant

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21. *Id.* at 158.

22. *Id.* at 159.

23. Hankin, *supra* note 7, at 332 (noting that such an award almost always involves intentional infliction of emotional distress).

24. *Corso v. Dog & Cat Hosp.*, 415 N.Y.S.2d 182, 182–83 (City Civ. Ct. 1979).

25. *Id.* at 183.

26. *Id.*

27. *Id.* However, other courts within the state have not accepted this ruling. See *Gluckman*, 844 F. Supp. 151 (1994). "In viewing a pet as more than property, however, the *Corso* opinion, and the few cases that follow it, are aberrations flying in the face of overwhelming authority to the contrary." *Id.* at 158.

28. *Corso*, 415 N.Y.S.2d at 183.

29. Hankin, *supra* note 7, at 341, 376–88, 410; see Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531 (1998) (arguing for a move away from the traditional view of animals as property and towards a new status as non-property). Although animals have, at one point in history, been put on trial and held responsible for crimes, the shift has been made away from this idea. See Kolber, *supra* note 13, at 179. This history of animal trials demonstrates that the concept of having animals in court and having their interests represented in one aspect in the legal system is not that far-fetched of an idea. Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals*, 17 ANIMAL L. 273, 273 (2011); see also Kolber, *supra* note 13, at 180. Animals being tried in their own cases "open[ed] up the possibility of thinking of animals as having a

action has been taken to change their property status.

*B. Legal Advancements of Animal Protections*

The advancements of animals' legal rights have become more prevalent in both state and federal law.<sup>30</sup> Every state now has laws against cruelty to animals.<sup>31</sup> Federal statutes have been created to protect animals, endangered species, and the welfare of animals.<sup>32</sup> Even with these statutes, however, issues remain regarding who has standing to sue on behalf of an animal and how the laws are enforced.<sup>33</sup>

*1. State Anti-Cruelty Laws*

Each state has enacted its own animal protection laws to prevent and punish cruelty to animals.<sup>34</sup> The inconsistencies across the states, however, show a varying degree of animal protection, with some states having more comprehensive laws and harsher punishments than others.<sup>35</sup> While states are beginning to increase and expand their anti-cruelty laws and penalties, there are still obstacles regarding enforcement and coverage.<sup>36</sup>

States have broadened their animal protection laws by expanding the types of offenses and increasing penalties.<sup>37</sup> States have also imposed duties on people who own animals.<sup>38</sup> Some laws mandate that animal owners provide proper food,

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form of partial legal personhood." Sykes, *supra*, at 295. In the historic trials, "animals were imbued with sufficient legal personhood to permit the law to act upon them as it would upon similarly-situated humans." *Id.* at 296 (quoting Anila Srivastava, "Mean, Dangerous, and Uncontrollable Beasts": *Mediaeval Animal Trials*, 40 MOSAIC 127, 128 (2007)).

30. Sunstein, *supra* note 11, at 1333, 1337.

31. *Id.* at 1337.

32. *Id.* at 1339.

33. *Id.* at 1335.

34. See generally ANIMAL LEGAL DEFENSE FUND, 2011 U.S. ANIMAL PROTECTION LAWS RANKINGS (2011), available at <http://aldf.org/downloads/ALDF2011USRankingsReport.pdf> (providing a comparative analysis of the comprehensiveness and strength of each state's animal protection laws). For an example of a determination of what is a pet, see *People v. Garcia*, 812 N.Y.S.2d 66 (App. Div. 2006) (holding that pet goldfish are companion animals within the meaning of an anti-cruelty statute).

35. See ANIMAL LEGAL DEFENSE FUND, *supra* note 34.

36. Hankin, *supra* note 7, at 365–70.

37. *Id.*

38. *Id.* at 368. See generally ANIMAL LEGAL DEFENSE FUND, *supra* note 34 (comparing animal protection laws of the states, including laws regulating cruelty, neglect, and basic standards of care).

water, and shelter, as well as veterinary care.<sup>39</sup> However, these laws vary greatly in their coverage and penalties across the states,<sup>40</sup> creating inconsistencies and possible confusion about the importance of these animal protection laws. Although these laws and protections vary by jurisdiction, there has been a general movement among the states towards offering greater protection for animals and greater penalties when animals are subject to cruelty or neglect.<sup>41</sup>

There are two major complications with state anti-cruelty laws regarding their enforcement. First, the laws are often not adequately enforced in practice.<sup>42</sup> Enforcement is unreliable and greatly depends on the willingness of the prosecution to try the case.<sup>43</sup> Animal cruelty and neglect cases are a low priority for over-worked prosecutors.<sup>44</sup> Prosecutions are generally only seen in the most reprehensible cases,<sup>45</sup> while other violations go unprosecuted and unpunished.<sup>46</sup>

Secondly, state anti-cruelty laws do not generally apply when the animal is used on a farm, in a factory for the production of food, or in a laboratory for medical or scientific purposes.<sup>47</sup> Animal exploitation in these areas often goes unregulated,<sup>48</sup> and cruelty against the animals there is common practice.<sup>49</sup> This distinction between animals kept as companions and those used for consumer goods clouds the overall concept of what animal protection and animal rights mean to people and the legislature.

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39. Hankin, *supra* note 7, at 368.

40. *Id.*

41. *Id.* at 365–68.

42. See Sunstein, *supra* note 11, at 1337–40.

43. See *id.*

44. See *id.* at 1339.

45. *Id.*

46. *Id.*

47. *Id.* at 1339, 1363; see *Taub v. State*, 296 Md. 439, 444 (Md. 1983) (holding that because “there are certain normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable,” the anti-cruelty law did not apply to researchers conducting medical and scientific research).

48. Sunstein, *supra* note 11, at 1339.

49. See Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 72 (2006) (discussing the problems animal advocates face against the exploitation of animals at institutions using them for consumer goods).

## 2. *Federal Legislative Action*

Progress has also been made in protecting animal welfare on the federal level.<sup>50</sup> A number of federal statutes have been passed to protect animals, endangered species, and to control other areas affecting animals, such as humane slaughter and conservation efforts.<sup>51</sup> Although the enactment of such statutes puts animal protection laws on the map, there are still obstacles in the enforcement of the laws.<sup>52</sup> These hurdles include the lack of resources to enforce the laws and the limited ability to procure standing before courts.<sup>53</sup>

### *i. The Animal Welfare Act*

One of the most important of the federal animal law statutes is the Animal Welfare Act of 1970, which was amended in 1976.<sup>54</sup> The Animal Welfare Act (AWA) aims to ensure humane handling and treatment of animals, with minimum requirements of care regarding food, water, housing, transportation, shelter, sanitation, and animal well-being.<sup>55</sup> The United States Department of Agriculture (USDA) is designated to enforce the statute, which has been criticized as being ineffective and underenforced.<sup>56</sup>

One limitation to the enforcement of the AWA is the USDA's lack of resources.<sup>57</sup> Because the AWA is only subject to public enforcement, private actors must rely on the USDA to use its limited budget to bring an action.<sup>58</sup> This has proved to be unreliable.<sup>59</sup> Private citizens and the affected animals do not have the ability to sue for wrongdoings.<sup>60</sup> Courts have held that the AWA "does not create a private cause of action and that Congress intended that only the Secretary of

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50. Sunstein, *supra* note 11, at 1339.

51. Kelch, *supra* note 29, at 542–44.

52. *Id.* at 532, 543.

53. *Id.*

54. 7 U.S.C. §§ 2131–2156 (2006). See generally Michael Hill, *The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception*, 61 CASE W. RES. L. REV. 651, 658–61 (2010).

55. Hill, *supra* note 54, at 660; Kelch, *supra* note 29, at 542; Sunstein, *supra* note 11, at 1341.

56. Hill, *supra* note 54, at 661; Kelch, *supra* note 29, at 543; Sunstein, *supra* note 11, at 1363–64, 1366.

57. Sunstein, *supra* note 11, at 1364, 1366.

58. See *id.*

59. See *id.*

60. Sunstein, *supra* note 11, at 1342.

Agriculture be able to enforce the law.”<sup>61</sup> The claims of private citizen alleging violations of the AWA often go unanswered.<sup>62</sup>

Another restriction of the AWA is the narrow scope of its application. The sections governing animal research only apply to a select number of warm-blooded animals, excluding many others.<sup>63</sup> Animals used for food and clothing production on farms are left unprotected under the AWA, as well as in many states where they are not subject to state anti-cruelty laws.<sup>64</sup> Though important, the AWA by no means offers fail proof protection for America’s animals.

*ii. The Endangered Species Act*

Another federal statute aimed at protecting the rights of animals is the Endangered Species Act of 1973.<sup>65</sup> The statute was created to offer protection against extinction to endangered or threatened species.<sup>66</sup> The Endangered Species Act (ESA) differs from the AWA in enforcement because it allows for a citizen-suit—in other words, it authorizes an individual person to sue for a violation of the Act.<sup>67</sup> This gives people more power to ensure the enforcement of an animal protection law, but it comes with its own obstacles. Even though a citizen may bring suit, acquiring standing before a court still remains a challenge.<sup>68</sup>

*C. What Constitutes Standing*

A major controversy in enforcement of animal protection laws is that it is often difficult to obtain standing in courts under the federal statutes.<sup>69</sup> There is confusion as to when

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61. *Zimmerman v. Wolff*, 622 F. Supp. 2d 240, 243–44 (E.D. Pa. 2008) (holding that the AWA does not provide a private cause of action).

62. *See id.*

63. 7 U.S.C. § 2132(g) (2006); Hankin, *supra* note 7, at 366; Sunstein, *supra* note 11, at 1342. The AWA only applies to certain animals, and excludes birds, rats and mice, horses not for research, and farm animals. *See* 7 U.S.C. § 2132(g).

64. Sunstein, *supra* note 11, at 1342.

65. 16 U.S.C. §§ 1531–1543 (2006).

66. Sunstein, *supra* note 11, at 1339.

67. Hill, *supra* note 54, at 665.

68. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that plaintiffs lacked standing to sue because they did not show a sufficiently imminent injury).

69. *See* Sunstein, *supra* note 11, at 1334.

standing is available and when it is lacking.<sup>70</sup> A person suing under a federal statute must sufficiently meet each standing requirement, and if one is missing, that person may not bring the suit.<sup>71</sup> Animals on the other hand, have generally not been able to acquire standing in their own right.<sup>72</sup> These restrictions place a burden on the enforcement of the statutes, and ultimately, on the rights of animals.<sup>73</sup>

### 1. *Constitutional Requirements of Standing*

For a person to have standing to bring suit in a federal jurisdiction, they must sufficiently satisfy three requirements<sup>74</sup>: (1) the complaining party must have an injury in fact, (2) there must be a causal connection between the conduct and the claimed injury, and (3) the injury must be redressable by the courts.<sup>75</sup> The first requirement is that the party suing must have an injury in fact, necessitating a “concrete and particularized” harm to that individual, and an “actual or imminent” violation of a legally protected interest.<sup>76</sup> The alleged injury may not be “conjectural” or “hypothetical.”<sup>77</sup> The second causal connection requirement means that the injury must be traceable to the alleged misconduct.<sup>78</sup> The third requirement dictates that it must be “likely” that the injury will be redressed by a favorable outcome by the courts.<sup>79</sup> These requirements, however, have presented difficulties when trying to assert standing based on

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70. *Id.*

71. See Kelch, *supra* note 29, at 535; see also *Sierra Club v. Morton*, 405 U.S. 727 (1972). Justice Douglas’ dissent in *Sierra Club* stated that inanimate objects are sometimes parties to litigation, that “[t]he voice of the inanimate object . . . should not be stilled,” that people should be able to speak on their behalf, and that “all of the forms of life . . . [should be able to] stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams.” *Id.* at 742, 749, 752 (Douglas, J., dissenting).

72. Hill, *supra* note 54, at 664; see *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (finding that the named orca whales in the suit lacked standing to sue because they did not have a legally protected right based on statutory interpretation).

73. See Hill, *supra* note 54, at 665.

74. Kelch, *supra* note 29, at 535.

75. *Id.*

76. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

77. *Id.*

78. *Id.*

79. *Id.* at 561.

an interest in animals.<sup>80</sup>

## 2. *Standing for Persons Suing Under Federal Statutes*

When suing under a federal statute, the complaining party must assert an injury to a legally protected interest in order to bring the suit in court.<sup>81</sup> This interest may be aesthetic, recreational, or ecological.<sup>82</sup> Some statutes, like the ESA, give private citizens a right to sue through a citizen-suit provision.<sup>83</sup> Others, like the AWA, do not have such an avenue for private enforcement and it is up to the government to protect the interest outlined in the statute.<sup>84</sup>

In animal protection suits, courts differ in allowing standing based on the circumstances surrounding the plaintiffs' stated interests in the animals.<sup>85</sup> In one case, a plaintiff had standing under the AWA because he sufficiently fulfilled the three standing requirements.<sup>86</sup> His alleged injury was to his aesthetic interest in observing animals in humane conditions at a zoo he frequented.<sup>87</sup> He was also involved in several animal organizations.<sup>88</sup> The court held that the plaintiff had standing, as "people have a cognizable interest" in viewing animals being humanely treated.<sup>89</sup>

In another case, however, an organization lacked standing for failing to allege the required injury.<sup>90</sup> The organization claimed that the Navy's shooting of goats on their own land negatively affected the organization's cause.<sup>91</sup> The court held that the organization did not have standing

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80. *Id.* at 562–64.

81. *Id.* at 560.

82. Kelch, *supra* note 29, at 535; Sunstein, *supra* note 11, at 1348.

83. 16 U.S.C. § 1540(g)(1) (2006).

84. 7 U.S.C. § 2146 (2006).

85. *Compare* Animal Prot. Inst. of Am. v. Hodel, 860 F.2d 920 (9th Cir. 1988) (holding that an association did have standing because they had a special interest in the animals that are protected by the statute), *with* Sierra Club v. Morton, 405 U.S. 727 (1972) (holding that plaintiffs lacked standing because they did not sufficiently allege that their corporation or its members would be injured by the alleged misconduct).

86. Animal Legal Def. Fund, Inc., v. Glickman, 154 F.3d 426 (D.C. Cir. 1998).

87. *Id.* at 429.

88. *Id.*

89. *Id.* at 433.

90. Animal Lover's Volunteer Ass'n v. Weinberger, 765 F.2d 937 (9th Cir. 1985).

91. *Id.* at 938.



because it did not show that its members would suffer injury.<sup>92</sup> The court stated that “[a] mere association of organizational interest in a problem” was not enough to allege the required injury for standing.<sup>93</sup> “A general contention that because of their dedication to preventing inhumane treatment of animals, . . . members will suffer distress if the goats are shot d[id] not constitute an allegation of individual injury.”<sup>94</sup> Thus, the court did not find that the harm caused by shooting the goats created the injury needed, even though the members had a special interest in the humane treatment of the goats.<sup>95</sup>

In *Lujan v. Defenders of Wildlife*,<sup>96</sup> the United States Supreme Court held that the plaintiffs did not have standing to sue because they did not show a sufficiently imminent injury and did not claim that the injury would be redressable by the Court’s decision.<sup>97</sup> The plaintiffs sued under the ESA, alleging that they would one day want to travel to see the endangered species in the wild, and the federally funded activities in foreign countries would likely increase the animals’ rate of extinction.<sup>98</sup> The Court was not swayed.<sup>99</sup> The injury was not sufficiently applicable to the plaintiffs directly.<sup>100</sup> The Court held that the injury to the plaintiffs was not imminent.<sup>101</sup> The “some day” intentions to travel were inadequate for standing purposes.<sup>102</sup> The Court needed a more specific and concrete plan from the plaintiffs to show the imminence and actual injury required for standing.<sup>103</sup>

The Court also held that the plaintiffs lacked standing due to their failure to show redressability.<sup>104</sup> The injury would not be remedied by the Court’s decision because the agencies funding the alleged misconduct were not parties to the action, therefore, the Court’s ruling would not affect their

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. 504 U.S. 555 (1992).

97. *Id.*

98. *Id.* at 562.

99. *Id.*

100. *Id.*

101. *Id.* at 564.

102. *Id.*

103. *Id.*

104. *Id.* at 568.

actions.<sup>105</sup>

Additionally, the Court discredited the plaintiffs' "animal nexus" theory, by which "anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing."<sup>106</sup> The Court stated that it was unacceptable that anyone who observes an endangered species anywhere in the world "is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection."<sup>107</sup> The Court rejected the notion that a "person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world."<sup>108</sup> Further, the Court did not see why "such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit."<sup>109</sup> Thus, the plaintiffs' interest in the animals and their general intention of seeing them in the future was not enough for the Court to confer standing in that case.<sup>110</sup>

However, in another case under the ESA, a plaintiff obtained standing because he demonstrated that the alleged injury was imminent and established redressability.<sup>111</sup> The plaintiff previously worked with the elephants of the Ringling Brothers and Barnum and Bailey Circus, where he developed a "strong, personal attachment to the animals."<sup>112</sup> His alleged injury was that he was prevented from visiting the elephants, now showing signs of mistreatment, because he would suffer "aesthetic and emotional injury" from seeing the elephants in that condition.<sup>113</sup> Because of the plaintiff's personal attachment to the elephants and his desire to visit them, the court held that his aesthetic injury was therefore sufficiently imminent.<sup>114</sup> Thus, in that case, the plaintiff acquired standing because of his close connection to the animals and

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105. *Id.*

106. *Id.* at 566.

107. *Id.*

108. *Id.* at 567.

109. *Id.*

110. *Id.* at 564.

111. *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003).

112. *Id.* at 335.

113. *Id.*

114. *Id.* at 338.

his imminent intent to visit them.<sup>115</sup>

### 3. *Standing for Animals to Sue in Their Own Name*

Animals themselves generally do not have standing to sue in their own right.<sup>116</sup> Legally considered to be property, animals do not have a legally protected interest under which to sue.<sup>117</sup> States may vary on the issue of animal owners' rights and bystanders' rights, but this Comment focuses on federal animal protection rights. Because Congress confers standing upon persons, animals lack standing to sue because they are not considered persons under the law (unlike minors or corporations).<sup>118</sup> No statute currently confers standing upon animals on their own behalf.<sup>119</sup> Although some courts have held that animals cannot bring suits as named plaintiffs, in an increasing number of cases, animals are doing just that.<sup>120</sup>

In one such case under the ESA, *Palila v. Hawaii Department of Land and Natural Resources*,<sup>121</sup> an endangered species of bird was a named plaintiff.<sup>122</sup> The court stated that the Palila, "a party to this proceeding" who was represented by attorneys, "has a legal status and wings its way into federal court as a plaintiff in its own right."<sup>123</sup>

Courts' contrasting views regarding precisely what circumstances afford standing and who can invoke it leave the enforcement of animal protection laws unclear.<sup>124</sup> The

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115. *Id.*

116. Hill, *supra* note 54, at 664.

117. *Id.* at 665.

118. Sunstein, *supra* note 11, at 1335, 1359. Inanimate objects being right-holders is seen in current law, and it may not be that far off of an idea for animals to have certain rights—although at first glance the idea of giving animals rights like corporations may seem scary or dangerous. See Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 452–53, 455, 464 (1972). Rights for animals do not need to encompass every right, or even the same rights as humans, because they are different; but they can share some degree of protection and rights. See *id.* at 457. Human animals should work together with non-human animals, compromising for the betterment of both. See *id.* at 481. This would be a step in the right direction in light of the value animals have in our society and in our homes.

119. Sunstein, *supra* note 11, at 1359.

120. *Id.*

121. 852 F.2d 1106 (9th Cir. 1988).

122. *Id.*

123. *Id.* at 1107.

124. For an example where standing for an animal was denied, see *Citizens*

inconsistency and obscurity of the standing issue only make the enforcement and seriousness of animal laws more puzzling.

## II. LEGAL ISSUES CREATED

The status of animals as property affects how they are treated under the law,<sup>125</sup> and how their value and rights are perceived, by limiting their ability to have the protections that are created for them enforced and to have their interests be taken seriously. Designated as property, animals have no legally cognizable right, and thus cannot have standing to sue to enforce the laws designed to protect them.<sup>126</sup> This, in effect, minimizes the ability for enforcement of animal protection laws, leaving more animals unprotected.

Individuals also face obstacles when attempting to sue on behalf of animals and their own interests in animals.<sup>127</sup> Often, they cannot sufficiently prove standing under the statute, and the statute goes unenforced, or enforced with severe inconsistencies and unreliability across courts.<sup>128</sup>

Animal protections are not taken seriously because animals are viewed as property, and as such, their rights will always fall behind human interests.<sup>129</sup> “Thus the game is rigged to render a result unfavorable to animals.”<sup>130</sup> Even a changing view in the value and interests in companion animals is not enough, without further legislative action and changes to current laws, to give animals the status and protections that they, and the people with an interest in them, deserve.

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to *End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993) (holding that dolphins lacked standing to sue).

125. Kelch, *supra* note 29, at 535.

126. *Id.*

127. *Id.*; *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that mere interest in an animal is not enough to satisfy the standing requirement); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (holding that plaintiffs lacked standing because they did not sufficiently allege injury).

128. Kelch, *supra* note 29, at 535.

129. *Id.*

130. *Id.* at 537. The rights of animals should be expanded legally, but also must be put “to work with empathy, in a way that strives (despite the inevitable limitations of a human justice system in this respect) to incorporate the animals’ own interests and own point of view.” Sykes, *supra* note 29, at 273.

### III. EFFECTS OF ANIMALS' PROPERTY STATUS ON STANDING REQUIREMENTS

The current state of animal law is riddled with inconsistencies, ineffectiveness, and confusion. The status of animals as property leads to many problems concerning the seriousness and understanding of their interests, enforcement of protection laws, and standing in court. These dilemmas leave animals at a disadvantage. The current laws regarding the status of animals and their protection are insufficient due to the inconsistencies caused by a lack of understanding of where animal law stands.

#### *A. Problems Resulting from Keeping Animals' Status as Property*

The status of animals as property is based on long-held tradition. The recent conflict and shift in the laws and perceptions of animals is derived from the increased awareness of animals' rights and people's changing view of animals by placing greater value on their companion animals.<sup>131</sup> Animals have grown in significance in the daily lives of people who have them as pets.<sup>132</sup> This changes the views and conceptions of animals. Because pet owners place more value on their companion animals, they view animals as deserving of more value, and ultimately more rights and protections.<sup>133</sup>

Inanimate property and animals vary in significant ways. However, they are labeled the same under the law. This creates problems when trying to apply a law to animals that is intended for inanimate property. Animals are different than other property—they have the capacity to suffer<sup>134</sup> and to give love. People form attachments with animals that they cannot have with other inanimate property. This automatically sets them apart.

The conflict arises when we are told that under the law, animals and other inanimate property should be treated the same. An animal's capacity to suffer distinguishes it from other property, which justifies giving animals protections and

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131. Hankin, *supra* note 7, at 316.

132. *Id.*

133. *See id.* at 316–19.

134. Sunstein, *supra* note 11, at 1335, 1363–66.

other rights not afforded to property.<sup>135</sup> These difficult concepts within animal law cause doubt and inactivity, not only for citizens attempting to sue on behalf of animals, but also for the courts.

The protections that would actually be afforded to animals through properly enforced laws are insufficient and not taken seriously in practice. This is because the property status of animals does not accurately reflect how many people feel about animals.<sup>136</sup> Laws with valid intentions go unenforced, thus creating unsettled confusion and inhibiting clarity in animal law.

One reason for the lack of seriousness is the failure to have a cohesive method throughout the states of applying value to injured or killed pets and of the coverage of anti-cruelty laws, which in effect prohibits the legal world from seeing the laws and animals' rights as important.<sup>137</sup> Because there is no connection between the states, the ability to have a comprehensive application of equal and consistent law is shattered.

At the federal level, confusion arises because the status of property is applied differently to different animals.<sup>138</sup> For companion animals, laws vary on what damages are recoverable for their injury or death,<sup>139</sup> however, further conflict surfaces when comparing them to farm or experiment animals.<sup>140</sup> The same laws do not apply to animals used for food, consumer production, or experiments.<sup>141</sup> This categorizes animals differently without an acceptable reason and widens the gap in understanding how animals should be treated under the law.

It is difficult to justify and comprehend that while some animals are protected from cruelty and afforded certain rights, other animals, because of their use, generally have no protection against abuse and death.<sup>142</sup> These animals, used on farms or for experiments, are simply a means to an end for a human interest, which outweighs any other interest

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135. *Id.* at 1363–65.

136. Hankin, *supra* note 7, at 319.

137. *See id.* at 368–70.

138. Sunstein, *supra* note 11, at 1339–42.

139. Kelch, *supra* note 29, at 537–39.

140. Sunstein, *supra* note 11, at 1339.

141. *Id.*

142. *See id.* at 1334–39.

because as property, these animals have virtually no rights.<sup>143</sup> This view has kept animals in an unstable world of unjustified categorizations. Continuing to allow animals to be exploited under inhumane conditions, solely for economic efficiency, perpetuates the confusion between how different animals are viewed and treated.<sup>144</sup> This uncertainty is holding back needed advancements in animal law.

Because human preference will always outweigh any animal interest, it is hard to move away from the concept of animals as property.<sup>145</sup> The interests of animals do not have much weight when there is a human interest at stake, and animals will continue to serve human interests, as they always have.<sup>146</sup> If the trend develops where animal interests are put before our own, those interests will be taken more seriously, and we will be able to more clearly see animals for what they are—something more than mere property.<sup>147</sup>

Courts have not been able to sufficiently articulate a reason why an interest in animals is different than an interest in anything else.<sup>148</sup> This makes it even more challenging for a plaintiff to explain why his or her interest should matter. Thus, many laws are ineffective and do not serve their intended purpose.<sup>149</sup> Not being able to effectively combat animal mistreatment only dampens the current status of animals, preventing animal rights from being taken seriously and advancing.<sup>150</sup>

#### *B. The Obstacle of Standing in Enforcing Animal Protection Laws*

Because animals are not granted standing in their own right in any statute, they must rely on a designated entity or a private citizen to speak on their behalf.<sup>151</sup> If the entity chooses not to enforce the statute, a prosecutor does not prosecute a case, or a citizen cannot show sufficient injury to gain standing, then the animal is left unprotected. It would

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143. *Id.* at 1339.

144. See Kelch, *supra* note 29, at 531–32.

145. SINGER, *supra* note 13, at 212.

146. See *id.*

147. See Kelch, *supra* note 29, at 533.

148. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 567 (1992).

149. See Kelch, *supra* note 29, at 532.

150. See Bryant, *supra* note 49, at 72.

151. Hill, *supra* note 54, at 664–65.

seem that because an animal may not sue for itself, that it would be simple for a person to sue on the animal's behalf.<sup>152</sup> However, this is not the case.<sup>153</sup>

Currently, mere interest in an animal is not enough to satisfy the standing requirement.<sup>154</sup> There must be something more.<sup>155</sup> This is where the conflict lies—in deciding under what circumstances an interest in an animal rises to the level needed to gain standing in an animal law case. This has proved to produce inconsistencies and confusion among the courts.

This conflict can be seen in the different opinions in *Lujan v. Defenders of Wildlife*.<sup>156</sup> While the majority opinion rejected the animal nexus approach, instead focusing on the imminence of the injury to the plaintiffs, the concurring and dissenting opinions struggled more with the interest in the animal and when it confers standing.<sup>157</sup> The majority opinion, in rejecting the theory which would allow plaintiffs with an interest in studying or seeing endangered animals to gain standing, was not able to distinguish between what a genuine interest was and what was not.<sup>158</sup>

Justice Stevens' concurring opinion offered a response to assist the understanding of the interest at issue.<sup>159</sup> The distinction was offered that only a genuine interest should be sufficient.<sup>160</sup> The majority however was unwilling to accept this distinction.<sup>161</sup> The concurring opinion analyzed the imminence requirement to standing differently from the majority opinion.<sup>162</sup> While the majority focused on the timing of the injury to the plaintiffs to assess imminence,<sup>163</sup> Justice Stevens emphasized the timing that the actual destruction of the endangered animals would occur.<sup>164</sup>

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152. *See id.* at 666.

153. *See, e.g., Lujan*, 504 U.S. 555.

154. *Id.*

155. *Id.* at 560, 563.

156. *See generally Lujan*, 504 U.S. 555.

157. *See id.*

158. *Id.* at 566–67.

159. *Id.* at 583–84 (Stevens, J., concurring).

160. *Id.* at 583.

161. *Id.* at 567 (majority opinion).

162. *Id.*

163. *Id.*

164. *Id.* at 583 (Stevens, J., concurring).



The dissenting opinion discussed how the distance of the injury should not mitigate the harm done.<sup>165</sup> Less emphasis was placed on the proximity of the harm in geographical terms.<sup>166</sup> The dissenting opinion also did not find it necessary to prove specifically concrete plans in order to gain standing.<sup>167</sup> Requiring such a description might eliminate standing in a variety of scenarios. The standard may be perched too high, especially for a plaintiff attempting to gain status on behalf of an animal by showing an injury to the his or her interest in that animal.

The variation in these opinions highlights the confusion, even among the Court, in determining what circumstances authorize standing. Because members of the Court cannot agree on what situations grant standing, it is challenging and complicated for a plaintiff to even attempt to understand when standing is warranted in an animal protection case.

The Ringling Brother's elephants case<sup>168</sup> referenced above could illustrate a progression in allowing standing for plaintiffs by focusing more on the personal connection and attachment to the animal, and the availability and opportunity to see or visit them. However, this could also cause even more confusion in the parameters of what constitutes close enough in distance and what will be regarded as a sufficiently close personal relationship.

This seems to be an underexplored topic, most likely because of its complexity and its tendency for arbitrary line drawing. It has the potential to be disputed among opposing parties in animal law cases, with judges unsure of where to settle because it is a relatively new concept for courts to navigate. Striving for ease in acquiring standing—currently, a seemingly difficult and intricate process—is necessary to ensure the proper and complete enforcement of animal protection laws.

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165. *Id.* at 594 (Blackmun, J., dissenting).

166. *Id.* at 595.

167. *Id.* at 592.

168. *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003) (holding that the plaintiff had standing because of the aesthetic and emotional injury due to his close relationship with the animals).

*C. Inadequate Progression of Animal Protection Under the Law*

Given the inadequate enforcement and difficulties associated with obtaining standing in animal protection cases, the progression of animal rights is severely hindered.<sup>169</sup> The historical, as well as current, notion of animals as property has lead to the perception that animals do not have many rights, that those rights are not to be taken seriously, and that enforcement of any of those rights carries little priority.<sup>170</sup> With such little weight afforded to an animal's rights, enforcement by people on the behalf of an animal should be more easily accessible and uniformly enforced. That, unfortunately, is not how these cases transpire.<sup>171</sup>

The insufficient enforcement of the laws further leads to the misconception that the rights of animals, if they exist, are unimportant. The rights and preferences of humans will always surpass those of an animal.<sup>172</sup> Although there have been changes and some advancements in animal law, stronger enforcement of the laws and greater access to standing is necessary.<sup>173</sup> Currently, the slow and shifting progression of protections for animals is not enough to ensure that the rights animals deserve will be upheld and adequately defended. A new concept of animals is necessary, one that moves beyond mere property. A status that more accurately reflects the place animals hold in our changing world is overdue.

## IV. PROPOSAL

In order for animal rights to be adequately protected, they must fully be understood, by both the courts and the people. As many different circumstances involve animals and their use, the law is not black and white on what rights are afforded and when. Different circumstances may call for different protections. Although there is a slippery slope argument when giving animals rights, allowing protections does not need to be an all or nothing scenario in every case—

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169. See Sunstein, *supra* note 11, at 1333–38.

170. See *id.*

171. See *Lujan*, 504 U.S. 555.

172. See SINGER, *supra* note 13, at 212.

173. See Hankin, *supra* note 7, at 316–19.

some rights may be afforded to some animals in particular situations depending on the circumstances involved for certain reasons (not arbitrary and confusing line-drawing). Several changes in the law should occur so that this understanding becomes more apparent and cohesive. Changes in the status of animals, as well as changes regarding standing, will help to clarify animal rights and will allow people to begin to take those rights seriously, while providing well-deserved protection to animals.

*A. Changes in Property Status*

A movement away from the traditionally accepted view of animals as property is the first essential modification.<sup>174</sup> A new status with legal rights above those of property would help to align our currently held views of animals with the rights animals should enjoy.<sup>175</sup> If an animal's status was considered something more than property, the animal would be given more rights and more significance would be placed on its interests. This would help promote the seriousness and understandability of animal rights and the need for protections.

Animals are different than property in many respects, and that should be reflected in the law, as it is already being reflected in our lives.<sup>176</sup> Animals are capable of returning love and of forming strong bonds with humans.<sup>177</sup> Non-animal property cannot do these things. Animals also have the capacity to suffer, while inanimate objects do not.<sup>178</sup> This capacity separates animals from other property, and calls for laws protecting animals from undue suffering.<sup>179</sup> A piece of property can be damaged or destroyed, while an animal can be injured or killed. A piece of property can be replaced, whereas an animal is irreplaceable as each one is truly different. These concepts are different and should be reflected in the law through a status for animals that is above property and affords animals more rights.

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174. See Kelch, *supra* note 29, at 531–37.

175. See Hankin, *supra* note 7, at 316–19.

176. *Id.*

177. *Id.* at 346, 376, 379–80, 387.

178. Sunstein, *supra* note 11, at 1335, 1363–66.

179. *Id.* at 1363–65.

Although this proposition will help bring awareness and seriousness to animal rights, it may be hard to implement. Turning away from the historically accepted principle of animals as property would be a confusing and difficult task. It would be hard to determine exactly what the status of an animal is and in what ways exactly it differs from mere property. However, this is a necessary change for the progression of animal rights. Animal rights will not be taken seriously or grow if animals are incorrectly labeled as property by the law.

Another necessary change to help the advancement of animal rights is a unifying set of rules regarding animal care and cruelty to be used throughout all of the states.<sup>180</sup> A federal law that offers standing more easily should be enacted to unite the conflicting state laws that tend to diminish the impact and importance of animal rights by being so diverse and inconsistent among the states.<sup>181</sup>

Because the status of property fails to accurately convey the value animals have or their rights that deserve to be recognized, more needs to be done in making people, the legislature, and courts aware of these rights. This way, the rights will be better understood and taken more seriously, and therefore better applied, and the animals will be better protected.

A step in the right direction is allowing an animal to be a named party in a case—as in *Palila*,<sup>182</sup> discussed above, where a bird was a named plaintiff.<sup>183</sup> This gives the animal, and therefore its cause, greater significance. If more animals were named as plaintiffs in animal protection suits, and it became more common to recognize animals in lawsuits, then animal rights would deservedly gain greater ground. The prominence and recognition in the legal community would give animal law the push it needs to continue to progress and serve animals.

Maybe if more people saw animals named as parties in lawsuits, they would not think of animals as merely property anymore because property cannot sue. There is no clear

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180. See Hankin, *supra* note 7, at 368–70.

181. See *id.*

182. *Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.2d 1106 (9th Cir. 1988).

183. See *id.*

negative implication of allowing an animal to be a named party in a suit. The interests asserted could be the interest of the animal itself or what would be best for people's interests in that animal. Naming an animal as a party only clarifies in the minds of the people what interests are at stake—a necessary component if animal law should continue to progress forward.

*B. A Shift in Standing*

The issue of insufficient avenues to acquire standing for animals and those with interests in animals creates problems with the enforcement of animal protection laws, and thus lessens their significance in the legal world.<sup>184</sup> There are many inconsistencies regarding standing among the courts that need clarification.

Greater protection for animals is needed because they cannot protect themselves. This will come from greater enforcement of the laws and by allowing standing in more circumstances. If these cases are given a greater priority, animal protection will have greater significance. More people will pay attention to the rights of animals and take them more seriously. Increasing enforcement and awareness will push animal law to co-exist with other valid laws and provide animals with the protections they need.

People's interests in animals must also be better protected. If a person has a genuine interest in an animal, that interest should be protected and enforceable in the courts. If a law violator can choose to break the law by harming an animal, a plaintiff should have the right to enforce the protection of that animal's rights. It is not logical to allow someone's interest to harm the animal take precedence over another person's interest to preserve the welfare of that same animal, which is protected by law, especially when that animal cannot protect its own rights.<sup>185</sup> Even interests in the protection of animals used in farming and experiments should be recognized. These animals should not go without protection when there are people who care about their rights and the animals are without the ability to obtain any sort of significant rights in such an

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184. See Sunstein, *supra* note 11, at 1334–35.

185. See *id.*

environment.<sup>186</sup>

A re-evaluation of the distinction between animals used on farms or in laboratories and all other animals needs to occur. It does not make sense to afford some animals protection and not others, based on the type of animal and what purpose they are intended to serve. This furthers the confusion surrounding what rights animals have, which in turn, slows down the progression of animal rights.

Finally, Congress must expressly confer standing upon animals under certain statutes.<sup>187</sup> Private causes of action should also be given to those statutes without a citizen-suit provision so that an animal's rights can be brought to court directly through a private citizen.<sup>188</sup> This will allow for another avenue of enforcement, thereby ensuring more animals' rights are preserved.

The legislature can combat the obstacle of standing by allowing animals to sue in their own name on behalf of their violated rights. The legislature must give a legally cognizable right to animals in order for them to have standing.<sup>189</sup> Although Congress generally gives standing to persons, nothing limits its power to give it to something else, such as animals.<sup>190</sup> Congress can, and should, allow animals to pursue standing in cases where their rights are violated.<sup>191</sup> Congress already authorizes standing for minors and corporations, and should create a right to have standing for animals too, who also have protected rights.<sup>192</sup> This will allow for animals and those that care about them to have a more easily accessible avenue through which to enforce the animals' designated rights.

### CONCLUSION

The property status of animals severely hinders their rights through creating confusion, inconsistencies, inadequate

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186. *See id.* at 1339. The current federal and state laws are not sufficient to provide this protection to animals—they simply fall short of the goals that they were set out to accomplish. *See supra* Part II.

187. *See* Sunstein, *supra* note 11, at 1336.

188. *See id.*

189. *See id.* at 1362.

190. *Id.* at 1360–61.

191. *Id.*

192. *Id.*

enforcement, and obstacles in gaining standing to sue.<sup>193</sup> Because animals are considered property and standing in animal protection cases is so difficult to obtain, animal rights are going unenforced and animals are needlessly suffering. Awareness needs to be spread to and through the people, the legislature, and the courts in order to highlight the importance of and the obstacles within animal laws.<sup>194</sup> Ultimately, designating animals as something more than property, and allowing animals and people with interests in animals greater access to standing, will advance the progression of animal rights so that they more accurately depict the significance animals hold in our current world and give them the protections they deserve.

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193. *Id.* at 1334–39.

194. Bryant, *supra* note 49, at 119.

## FROM SOCIAL JUSTICE TO ANIMAL LIBERATION

CARTER DILLARD & MATTHEW HAMITY\*

### INTRODUCTION

When a billion dollar corporation tortured thousands of pigs by roasting them to death as they screamed, the punishment was swift and severe—not for the corporation, but for the activist who filmed it.<sup>1</sup>

Nine years earlier, the same corporation, Iowa Select Farms, was exposed in a similarly harrowing video: piglets hurled about like refuse, their skulls smashed into concrete, open sores festered, caged skin-tight, mouths desperately gnawed on bars, and more screams.<sup>2</sup> Yet Iowa responded not by passing new regulations to prevent further brutality, but rather by passing the Nation's first ag-gag law, which criminalized the release of the incriminating footage.<sup>3</sup> That same year, the United States Supreme Court unanimously held that California could not require that dying cows and pigs, broken by years of brutality and neglect, receive the mercy of a quick death.<sup>4</sup>

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\* Special thanks to Julia Nagle for the work on corporate liability she contributed to this article.

<sup>1</sup> See Donnelle Eller, *Charges Dropped Against Animal Rights Activist Who Secretly Filmed Iowa Pigs Being Killed*, DES MOINES REG. (Jan. 29, 2021), <https://www.desmoinesregister.com/story/money/agriculture/2021/01/29/secret-filming-grundy-county-iowa-pig-killings-felony-charge-dropped/4310605001/>. Matt Johnson, the activist who exposed the cruelty at Iowa Select Farms, initially faced felony trespass charges. *Id.* However, Iowa Select Farms “asked that the [] case be dismissed after Johnson subpoenaed employees to testify,” including the owner. *Id.* Johnson has since been charged. *Id.*

<sup>2</sup> Anne-Marie Dorning, *Iowa Pig Farm Filmed, Accused of Animal Abuse*, ABC NEWS (June 29, 2011), <https://abcnews.go.com/Business/iowa-pig-farm-filmed-accused-animal-abuse/story?id=13956009>.

<sup>3</sup> Dan Flynn, *Iowa Approves Nation's First 'Ag-Gag' Law*, FOOD SAFETY NEWS (Mar. 1, 2012), <https://www.foodsafetynews.com/2012/03/iowa-approves-nations-first-ag-gag-law/>; see generally Krissy Kasserman, *Ag-Gag Laws Are Unconstitutional But Iowa Sure Keeps Trying*, FOOD & WATER WATCH (June 29, 2020), <https://www.foodandwaterwatch.org/news/ag-gag-laws-are-unconstitutional-iowa-sure-keeps-trying>. Notably, ALDF went on to challenge Iowa's ag-gag law as unconstitutional, succeeding in court, only to have the Iowa legislature pass yet another ag-gag law. *Id.* Iowa then passed a second ag-gag law, which ALDF again successfully challenged, only to have the Iowa legislature make yet another attempt, passing a third ag-gag law. *Id.*

<sup>4</sup> *National Meat Ass'n. v. Harris*, 565 U.S. 452 (2012) (holding that the Federal Meat Inspection Act preempted the California Penal Code provision requiring immediate euthanasia of nonambulatory animals); see also David N. Cassuto, *Meat*



Given the deeply entrenched anthropocentric status quo, where animal cruelty is legally justified so long as the cruelty is “standardized” (i.e. profitable to industry);<sup>5</sup> where the percentage of American vegetarians has remained a paltry 1% since the mid 1990’s;<sup>6</sup> where the global, long-term impacts of animal industries threaten the right of both future human and nonhuman animals to thrive,<sup>7</sup> this Article calls for a fundamental reimagining of animal law and policy, oriented around the cultivation of transgenerational empathy.

Recognizing that upstream policies aimed at long-term change have been neglected in the animal advocacy space--and guided by the principle that animal rights and human rights are ultimately interdependent--this Article proposes investments in family planning and early childhood education to ensure that every future child has the resources to thrive. Endowed with a fair start in life, those children, and their children’s children, may develop and express greater empathy and, in turn, better protect the rights of those most vulnerable among us, both two and four-legged. By the same token, the interdependence of animal and human rights necessitates the reorientation of current animal law and policy initiatives toward a rallying cry of social justice for all sentient beings. While remedying things like the animal rights movement’s relative silence in the face of recent attacks on women’s bodily autonomy<sup>8</sup> will be one example of threading animal protection into the larger social justice movements, such a reorientation might begin with holding corporations accountable rather than animal industry laborers, who are themselves frequently victims of corporate cruelty.

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*Animals, Humane Standards, & Other Legal Fictions*, LAW, CULTURE & THE HUMAN, 1, 12 (2012) (“A slaughterhouse facility can seriously injure an animal, take in and slaughter animals already gravely sick or injured, and process them into the human food supply, all the while treating them humanely. This humane treatment is accomplished through the oversight of meat inspectors whose mandate has literally nothing to do with animal welfare.”).

<sup>5</sup> As Professor David Cassuto & Amy O’Brien note, “animal cruelty laws define necessity in terms of the needs of the person inflicting the cruelty.” David N. Cassuto & Amy O’Brien, *Don’t Be Cruel (Anymore): A Look at the Animal Cruelty Laws of the United States & Brazil with a Call for a New Animal Welfare Agency*, 43 B.C. ENV’T AFF. L. REV. 1, 16 (2016).

<sup>6</sup> While the percentage of “self-identified vegetarians” has increased in recent years, the majority of self-identified vegetarians report having eaten meat when asked to list everything they ate during two non-consecutive 24-hour periods. Saulius Šimčikas, *Is The Percentage Of Vegetarians and Vegans In The U.S. Increasing?*, ANIMAL CHARITY EVALUATORS (Aug. 16, 2018), <https://animalcharityevaluators.org/blog/is-the-percentage-of-vegetarians-and-vegans-in-the-u-s-increasing/#2>.

<sup>7</sup> See, e.g., Kyle H. Landis-Marinello, Comment, *The Environmental Effects of Cruelty to Agricultural Animals*, 106 MICH. L. REV. FIRST IMPRESSIONS 147 (2008), <http://www.michiganlawreview.org/firstimpressions/vol106/landis-marinello.pdf>.

<sup>8</sup> See *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

Buoyed by a broader coalition across the social justice spectrum and a more empathetic future populace, along with the continued rise of cruelty-free alternatives and corresponding decreased dependence upon animal-exploiting industries,<sup>9</sup> the end of legalized, standardized cruelty is possible.

But it will take a reconceptualization of “animal law” itself as an aspiration, not as top down provisions of law handed down by anthropocentric concentrations of power disconnected from the actual practice of social, political, economic and environmental justice—the system that created the climate crisis—but as the ideal of bottom up, inclusive and just systems that have aligned the matching values of animal liberation, ecological restoration, economic equity, and participatory and reflective democracy,

## I. ANIMAL LAW AS MISNOMER

Given the abundant evidence that “animal law” in its current form is but a misnomer, the need to reimagine animal law and policy becomes clear.

### a. *Personification of Corporations and Objectification of Animals*

Animal lawyers have long been hamstrung by the persistent jurisprudential objectification of sentient beings, with courts embracing an ostensibly narrow definition of legal personhood,<sup>10</sup> notwithstanding the expansion of rights afforded corporate “persons.”<sup>11</sup>

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<sup>9</sup> See, e.g., Bill Gates, *The Future of Food*, GATES NOTES (Mar. 18, 2013), <https://www.gatesnotes.com/about-bill-gates/future-of-food>; *11 Industries Responding to the Meatless Revolution*, CBI INSIGHTS (Oct. 15, 2019), <https://www.cbinsights.com/research/meatless-transforming-industries/>.

<sup>10</sup> See, e.g., *ALDF v. USDA*, 933 F.3d 1088 (9th Cir. 2019); *People ex rel. Nonhuman Rts. Project, Inc. v. Lavery*, 124 A.D.3d 148 (N.Y. App. Div. 2014); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012). But see *Community Of Hippopotamuses Living In The Magdalena River, Applicant, To Issue Subpoenas For The Taking Of Depositions Pursuant To 28 U.S.C. § 1782*, No. 1:21-mc-23, 2021 WL 5025353 (S.D. Ohio Oct. 15, 2021) (Verdict, Agreement and Settlement) (allowing hippopotamuses as “interested persons” under 28 U.S.C. § 1782 to receive discovery).

<sup>11</sup> See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding that the First Amendment prohibits the government from restricting political independent expenditures by corporations); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (holding corporation had a right under the Religious Freedom Restoration Act to deny employees health coverage for contraception, which employees would otherwise be entitled to); Kent Greefield & Adam Winkler, *The U.S. Supreme Court’s Cultivation of Corporate Personhood*, THE ATLANTIC (June 24, 2015), <https://www.theatlantic.com/politics/archive/2015/06/raisins-hotels-corporate-personhood-supreme-court/396773/>.

In *United States v. Martin Linen Supply Co.*, the Supreme Court included corporations within the Fifth Amendment's protection against double jeopardy because such protection was necessary to protect corporations from "anxiety" and "insecurity."<sup>12</sup> Of course, it is animals, not corporations, that possess the capacity to suffer anxiety, insecurity, stress, and pain.<sup>13</sup> And yet, courts refer to animals as "property,"<sup>14</sup> "the consumed,"<sup>15</sup> and "goods,"<sup>16</sup> with one court conducting a thorough textual analysis to determine whether 72 pigs who had perished on an airplane flight were "damaged goods" or "destroyed goods."<sup>17</sup> (The USDA refers to animals as "units," where "an animal unit is equivalent to 1,000 pounds of live weight."<sup>18</sup>)

While corporate "persons" may spend money to influence (1) the elections of political representatives, (2) the positions that those representatives take on particular issues, and (3) the officials chosen to head the administrative bodies that regulate them,<sup>19</sup> animals have virtually no legal protections or remedies. This inverse relationship between corporate power and that of animal welfare plays out in stark terms under anti-cruelty statutes: all fifty states have laws against animal cruelty, and all fifty states have explicit or implicit exemptions that immunize standardized corporate cruelty—exemptions secured through industry lobbying and regulatory capture.<sup>20</sup>

<sup>12</sup> *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

<sup>13</sup> Jeffrey Moussaieff Masson & Susan McCarthy, *WHEN ELEPHANTS WEEP: THE EMOTIONAL LIVES OF ANIMALS* 232 (1995); Tim Carman, *Scientists Say Fish Feel Pain*, WASHINGTON POST (May 24, 2018), <https://www.washingtonpost.com/news/food/wp/2018/05/24/scientists-say-fish-feel-pain-it-could-lead-to-major-changes-in-the-fishing-industry/>.

<sup>14</sup> See, e.g., *Matter of Ruth H. v. Marie H.*, 159 A.D.3d 1487, 1490 (N.Y. App. Div. 2018) (finding the court exceeded its authority in directing petitioner to find foster care for respondents' cat because the cat was "property").

<sup>15</sup> *Animal Legal Defense Fund v. Hormel*, Public Justice Food Project (Apr. 8, 2019) ("ALDF, however, is organized and operating to promote not the interests and rights of the consumers of Hormel meat products, but rather those of the consumed.").

<sup>16</sup> *Nuijens v. Novy*, 543 N.Y.S.2d 887, 890 (N.Y. Town Ct. 1989).

<sup>17</sup> *Hughes-Gibb & Co. v. Flying Tiger Line, Inc.*, 504 F. Supp. 1239, 1242 (N.D. Ill. 1981). *But see* OR. REV. STAT. § 167.305(1) (2017) ("Animals are sentient beings capable of experiencing pain, stress and fear.").

<sup>18</sup> Robert L. Kellogg, *Profile of Farms with Livestock in the United States: A Statistical Summary*, U.S. DEP'T OF AGRIC. (Feb. 4, 2002), [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/home/?cid=nrcs143\\_014121](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/home/?cid=nrcs143_014121).

<sup>19</sup> See, e.g., Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/?mclid=ce0018caae0111ecb0fee24273cbaa89>.

<sup>20</sup> See, e.g., Dion Casey, *Agency Capture: The USDA's Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL'Y 142, 142 (1998) (discussing the capture of the USDA by the meat industry); Katharine M. Swanson, *Carte Blanche for Cruelty:*

Standard industry practices that ostensibly fall outside the scope of the cruelty laws include ventilation shutdowns,<sup>21</sup> water-based foam,<sup>22</sup> anal and genital electrocution,<sup>23</sup> thoracic compression,<sup>24</sup> maceration,<sup>25</sup>

*The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 953 (2002) (describing how the regulatory requirements for exercise of dogs under the AWA were weakened in response to pressure from the biomedical industry); Rebecca P. Lewandoski, *Spreading the Liability Net: Overcoming Agricultural Exemption with EPA's Proposed Co-Permitting Regulation Under the Clean Water Act*, 27 VT. L. REV. 149, 149 (2002); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 560 (2003) ("[P]harmaceutical companies capture the regulatory process."); Collette L. Adkins Giese, *Twenty Years Wasted: Inadequate Usda Regulations Fail to Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221, 244-45 (2006) (discussing USDA's willingness to significantly weaken its proposed primate regulations in response to concerns from the biomedical industry); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 308-09 (2000) (stating that, under "tremendous farm industry lobby pressure," Congress extended the implementation phase-out date for methyl bromide, a dangerous pesticide used on crops); Betsy Tao, *A Stitch in Time: Addressing the Environmental, Health, and Animal Welfare Effects of China's Expanding Meat Industry*, 15 GEO. INT'L ENV'T L. REV. 321, 349 (2003) (arguing that the weakening of U.S. anticruelty statutes through exemptions and lack of enforcement is due to the significant political power wielded by the American agricultural industry); Dena M. Jones & Sheila Hughes Rodriguez, *Restricting the Use of Animal Traps in the United States: An Overview of Laws and Strategy*, 9 ANIMAL L. 135, 152 (2003) (attributing the failure of federal anti-trapping legislation to the efforts of powerful lobby groups representing hunting, trapping, agricultural, and commercial fur interests).

<sup>21</sup> "Ventilation shutdown" means sealing the building in which farmed animals are confined, shutting the inlets, and turning off the fans. AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS: 2019 EDITION, AM. VETERINARY MED. ASS'N (2019), <https://www.avma.org/sites/default/files/resources/AVMA-Guidelines-for-the-Depopulation-of-Animals.pdf>. The farmed animals' body heat raises the temperature in the building until they die from hyperthermia and hypoxia. *Id.*

<sup>22</sup> "Water-based foam" means pumping foam into a building housing farmed animals in order to suffocate and drown them. Letter from Lloyd Doggett, U.S. House Representative, to Sonny Perdue, Secretary of Agric., U.S. Dep't of Agric., <https://doggett.house.gov/media/press-releases/avoiding-prolonged-death-animals-meat-industry>.

<sup>23</sup> On fur farms, animals are often killed via anal or genital electrocution, to avoid damaging the fur. See *Animal Suffering in the Fur Trade*, HUMANE SOC'Y INT'L (Oct. 13, 2015), <https://www.hsi.org/news-media/animal-suffering/>.

<sup>24</sup> "Thoracic compression is the application of pressure to an animal's chest to prevent respiration and/or cardiac movements to cause death." *Welfare Implications of Thoracic Compression*, AM. VETERINARY MED. ASS'N (Oct. 11, 2011), <https://www.avma.org/resources-tools/literature-reviews/welfare-implications-thoracic-compression>.

<sup>25</sup> Male chicks are ground up alive or "macerated," as a standard industry practice. See Maryn McKenna, *By 2020, Male Chicks May Avoid Death By Grinder*, NAT'L GEOGRAPHIC (June 13, 2016), <https://www.nationalgeographic.com/culture/food/the-plate/2016/06/by-2020--male-chicks-could-avoid-death-by-grinder/>.

live exsanguination,<sup>26</sup> force-feeding,<sup>27</sup> and starvation.<sup>28</sup> Thus, the anti-cruelty laws are “drafted in such a way as to make common (and cruel) agricultural practices acceptable, make enforcing the law impracticable, and render offenders immune from prosecution.”<sup>29</sup>

*b. The Minimal Animal Welfare Protections and Related Regulations that Do Exist are Absurdly Interpreted, and Politically Undermined*

In 1972, under pressure from the animal research industry, the Secretary of Agriculture excluded birds, mice, rats, and farmed animals from the definition of “animal” under the Animal Welfare Act, i.e. the vast majority of the animals we experiment on.<sup>30</sup> The Animal Legal Defense Fund successfully challenged this exclusion on the merits in *ALDF v. Madigan* as the court found that the exclusion conflicted with the plain meaning of the statute since laboratory birds, mice, rats, and farmed animals all clearly fell within the statute’s category of any “such other warm-blooded animal.”<sup>31</sup> When the judgment was vacated on the grounds that the plaintiff lacked standing, the Alternative Research and

<sup>26</sup> “The Scientific Panel of Animal Health and Welfare of the European Food Safety Authority concluded that exsanguination without stunning is inhumane and should not be used for slaughter.” Yet this method remains in commercial use. Stephanie Yue, *An HSUS Report: The Welfare of Farmed Fish at Slaughter*, HUMANE SOCIETY OF THE U.S., <https://www.humanesociety.org/sites/default/files/docs/hsus-report-animal-welfare-farmed-fish-at-slaughter.pdf> (last visited Apr. 17, 2022).

<sup>27</sup> Foie gras production, for example, involves force feeding ducks by pinning them down and jamming a half-inch diameter, one-foot metal pipe down each duck’s esophagus, resulting in livers over 10 times their normal size. *Ducks and Geese Are Tortured to Produce Foie Gras*, PETA U.K., <https://www.peta.org.uk/features/ducks-and-geese-are-tortured-to-produce-foie-gras/> (last visited Apr. 17, 2022). The process leaves ducks on the verge of death: bloated, panting, and barely able to walk from the diseased, distended liver pressing against their lungs. *Id.*

<sup>28</sup> Molting, for example, has traditionally been induced by withdrawing feed from four days to as long as two weeks. Recognizing the cruelty of this practice, the United Egg Producers guidelines now state that only non-feed-withdrawal molt methods—such as using specialized feed for non-producing hens and minimizing exposure to light—will be permitted for United Egg Producers (UEP) members. That being said, adherence to UEP guidelines is voluntary. See D. D. Bell, *Historical and Current Molting Practices in the U.S. Table Egg Industry*, 82 ANIM. SCI. J. 965, 968 (2003).

<sup>29</sup> Cassuto & O’Brien, *supra* note 5, at 10-12.

<sup>30</sup> Birds, mice, and rats represent more than ninety-five percent of the feeling creatures using in research facilities. “[It is] estimated as many as 100 million birds, rats and mice are also used and killed in research and for education each year.” BRUCE A. WAGMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 506-07 (4th ed. 2010).

<sup>31</sup> Animal Legal Def. Fund v. Madigan, 781 F. Supp. 797, 799 (D.D.C. 1992).

Development Foundation challenged the exclusion,<sup>32</sup> finally resulting in a settlement in 2000 where the USDA agreed to initiate a rulemaking procedure that included the regulation of rats, mice, and birds under the AWA. A victory nearly thirty years in the making proved illusory, however, when Congress intervened, passing an amendment to the 2002 federal “Farm Bill” that specifically excluded birds, mice and rats from the protections of the AWA.<sup>33</sup>

Of course, this is not an isolated case of government agencies adopting nonsensical statutory interpretations in order to maximize the profits of animal industries. Consider, for example, the Twenty-Eight Hour Law,<sup>34</sup> where until 2006, the USDA interpreted the word “vehicle” in the statute not to include “trucks” thereby depriving billions of animals of the modest right of being let out of those vehicles transporting them to slaughter once every twenty-eight hours so that they could eat, drink, and exercise.<sup>35</sup> The Twenty-Eight-Hour law continues to be interpreted by the USDA to exclude chickens, though the law applies to all “animals.”<sup>36</sup> Apparently, once again, “birds are not animals.”<sup>37</sup>

In California, a court held that Proposition 2, an animal welfare ballot initiative, actually *reduced* the legal protections for certain animals, in clear conflict with the voters’ intent. ALDF had alleged that nursing mother pigs were placed in body-gripping “farrowing crates” for three weeks at the 2013 California State Fair, rendering them unable to walk, turn around, or stand comfortably in violation of California Penal Code 597t<sup>38</sup>, which prohibited the confinement of any animal without adequate exercise. And yet, the court held that Proposition 2—which prohibited some forms of confinement but did not prohibit farrowing crates—superseded 597t and the court dismissed the case on those grounds.<sup>39</sup>

<sup>32</sup> See Animal Legal. Def. Fund v. Glickman, 204 F.3d 229 (2000) (holding that the plaintiff had standing because she was a college student who suffered a direct and personal injury from regularly observing the inhumane treatment of rats in laboratory experiments which she was obliged to participate in as part of the school’s course requirements).

<sup>33</sup> Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10301, 116 Stat. 491 (2002); 7 U.S.C. § 2132(g).

<sup>34</sup> 49 U.S.C. § 80502.

<sup>35</sup> The 28 Hour Law only applies to the transport of animals raised for food across state lines.

<sup>36</sup> The exclusion of chickens is particularly significant since chickens make up ninety percent of the animals transported and killed for food. See WAGMAN ET AL., *supra* note 30, at 420.

<sup>37</sup> See Clay v. New York Cent. R.R. Co., 231 N.Y.S. 424, 428 (N.Y. App. Div. 1928).

<sup>38</sup> CAL. PEN. CODE § 597t.

<sup>39</sup> *Hearing Today on Mistreated Mother Pigs at State Fair*, ANIMAL LEGAL DEF. FUND (June 16, 2015), <https://aldf.org/article/hearing-today-on-mistreated-mother-pigs-at-state-fair/>.



The California Department of Food and Agriculture (CDFA) similarly allowed industry to exploit a technical ambiguity in Proposition 2 by the denial of billions of egg-laying hens adequate space to “fully spread both wings without touching the side of an enclosure.” While space to “fully spread both wings without touching the side of an enclosure” is a simple enough concept, and sufficiently specific to survive Constitutional scrutiny,<sup>40</sup> in practice, the lack of a numerical minimum space requirement allowed producers to legally avoid the additional space requirement.

A study commissioned by the CA Dept. of Food and Ag, “Determination of Space Use by Laying Hens,” concluded that while an individual hen would require 322 square inches in compliance with Proposition 2’s wing flapping requirement, *as little as 90 square inches* per hen might be sufficient in an enclosure holding 60 hens because “of the lack of clarity of the Proposition with respect to how many hens need to be able to simultaneously perform the particular behavior(s) listed.”<sup>41</sup> Yet the egg industry itself, in the lead-up to the passage of Proposition 2, concluded that “a reasonable interpretation of the practical effect of the language in the initiative is that each hen, whether caged or cage-free, would be required to have a minimum of 784 square inches of space (28 × 28) which is 5.4 square feet.”<sup>42</sup> In other words, a law that reasonably required at least 784 square inches of space for laying hens was entirely undercut by an unreasonable interpretation advanced by a government-funded study, and that is to say nothing of Section 597t, which on its terms already provided substantially more space than allotted under Proposition 2.

A decade later, voters passed Proposition 12 in a second attempt to provide incremental improvements in the lives of farmed animals, this time with a specific numerical requirement of 144 square inches until 2022, followed by cage free housing that will still allow hens to be confined by the thousands in sheds, spending their entire lives indoors (assuming the Legislature doesn’t change its mind before then, as is allowed to under the statute without voter approval). In the three years since Proposition 12’s passage, state officials have continued to miss deadlines for promulgating corresponding regulations, and a coalition of California restaurants and grocery stores have, in turn, filed suit to delay

<sup>40</sup> Dan Flynn, *Appeals Court: CA’s Proposition 2 Passes Constitutional Muster*, FOOD SAFETY NEWS (Feb. 5, 2015), <http://www.foodsafetynews.com/2015/02/language-used-in-sizing-laying-hen-cages-passes-constitutional-test/>.

<sup>41</sup> Joy A. Mench & Richard A. Blatchford, *Determination of Space Use by Laying Hens Using Kinematic Analysis*, 93(4) POULTRY SCI. 794, 794-98 (2014).

<sup>42</sup> *What the Ag Industry & UC Davis Say*, U.S. HUMANE SOC’Y, <http://cagefreeca.com/what-they-say/what-the-ag-industry-uc-davis-say/> (last visited Feb. 11, 2021).

the enforcement of the law as applied to pigs until those regulations are adopted.<sup>43</sup> The upshot is that after fourteen years, two ballot initiatives, and multiple lawsuits, laying hens in California will continue to be deprived of “space for adequate exercise,”<sup>44</sup> i.e. less than a reasonable interpretation of 597t would require, under a law whose enforcement remains in jeopardy.

### *c. Animal Law as a Misconception, and Aspiration*

There are other reasons to question the nature of what we often call animal law: What we refer to as animal law is really human law that happens refer to animals, while excluding legal and practical protection for the vast majority of nonhumans, and designating the vast majority—wildlife—as property, quietly bundled into an anthropocentric concept of the environment as a human resource designated to absorb and be altered by things like greenhouse gas emissions.<sup>45</sup> That conception hurts animals,<sup>46</sup> having little to do with the fundamental and existential threat to nonhumans—our replacing them.<sup>47</sup>

How might our thinking of “animal law” or other terms that imply a benefit to nonhumans have been different? Were, long ago, humans to have seen themselves as equal parts of a complex ecology rather than a dominant species capable of shaping the world to its needs, we would have been obligated—in family, food, land use, and dozens of other policy areas—to limit ourselves *existentially* to such just such an ecology.<sup>48</sup> That means smaller families, parenting delay

<sup>43</sup> See Scott McFetridge, *Will New Bacon Law Begin? California Grocers Seek Delay*, ASSOCIATED PRESS (Dec. 12, 2021), <https://www.usnews.com/news/business/articles/2021-12-12/will-new-bacon-law-begin-california-grocers-look-for-delay>.

<sup>44</sup> See Katie Crumpley, *How Cage-Free Egg Clwilderaims May Be Deceptive*, FACTORY FARMING AWARENESS COAL. (Nov. 18, 2021), <https://ffacoalition.org/articles/how-cage-free-egg-claims-may-be-deceptive/>.

<sup>45</sup> See *The Paris Agreement: What is the Paris Agreement?*, U.N. CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited July 12, 2022); see also Carter Dillard, *Earth Day 2022: Climate Reparations, Existential Justice, and Our Open Letter to Exxon*, FAIR START MOVEMENT (Apr. 14, 2022), <https://fairstartmovement.org/earth-day-2022-climate-reparations-existential-justice-and-our-open-letter-to-exxon/>.

<sup>46</sup> See, e.g., Justin Marceau & Angela Fernandez, *Happy the Elephant: Lessons for the Future of Animal Rights Law*, SLATE (June 17, 2022, 9:32 AM), <https://slate.com/news-and-politics/2022/06/happy-the-elephant-lessons-for-the-future-of-animal-rights-law.html> (discussing positive law as a form of misdirection).

<sup>47</sup> See Jane Marsh, *How Human Population Leads to Animal Extinction*, ENVIRONMENT (July 19, 2018), <https://environment.co/how-overpopulation-leads-to-animal-extinction/>.

<sup>48</sup> See Carter Dillard & Nandita Bajaj, *Humane Families: Towards Existential*

and readiness, and redistribution to wealth to incentivize these things and ensure equal empowerment of children.<sup>49</sup> Such a move would have required fundamentally challenging the anthropocentric nature of our legal systems, something many of the originators of the term “animal law” and other protective terms evaded doing. To the extent Peter Singer evaded these reforms with a misleading focus on farmed animals<sup>50</sup>—rather than all future animals and future persons’ relations with those animals<sup>51</sup>—as the majority for whom we should be concerned if we want to maximize impact, he played a large role in this misdirection. The climatological effects of that misdirection, alone, cannot be overstated, preventing family reforms that could have saved countless animal lives.<sup>52</sup> But nothing is “animal law” or animal-benefitting—except in the thinnest and most useless of senses—if it does not orient from their (and hence our) biodiverse and life-giving world.<sup>53</sup> In other words, there is no such thing as anthropocentric animal law, unless you want to disregard the function of law—to protect its subjects.<sup>54</sup> Thinking there is commits the common mistake of trying to magically separate humans from their language and ideation as well as the ecologies in which they live,<sup>55</sup> a mistake with massive consequences given the climate crisis.

The misnomer argument is true for conceptual reasons, in that a fundamentally ecocentric system necessitating smaller populations of prosocial persons would have maintained the capacity to be more reflective of its human subjects,<sup>56</sup> but also practical reasons—because

*Justice and Freedom*, REWILDING EARTH (Feb. 1, 2022), <https://rewilding.org/humane-families-towards-existential-justice-and-freedom/>.

<sup>49</sup> See Matthew Hamity et al., *A Human Rights Approach to Planning Families*, 49(3) SOC. CHANGE 469 (2019).

<sup>50</sup> See PETER SINGER, *ANIMAL LIBERATION* 7-18 (1973).

<sup>51</sup> See Robert Wiblin, *Toby Ord on Why the Long-Term Future of Humanity Matters More than Anything Else, and What We Should Do About It*, 80,000 HOURS (Sept. 6, 2017), <https://80000hours.org/podcast/episodes/why-the-long-run-future-matters-more-than-anything-else-and-what-we-should-do-about-it/>.

<sup>52</sup> See Craig K. Chandler, *How Family Size Shapes Your Carbon Footprint*, YALE CLIMATE CONNECTIONS (Mar. 29, 2019), <https://yaleclimateconnections.org/2019/03/how-family-size-shapes-your-carbon-footprint/>.

<sup>53</sup> *An Enduring American Heritage: A Substantive Due Process Right to Public Wild Lands*, 51 E.L.R. 10026 (2021), <https://fairstartmovement.org/wp-content/uploads/2021/02/51.10026.pdf>.

<sup>54</sup> See Damian Carrington, *Global Heating Linked to Early Birth and Damage to Babies’ Health, Scientists Find*, THE GUARDIAN (Jan. 15, 2022), <https://www.theguardian.com/environment/2022/jan/15/global-heating-linked-early-birth-damage-babies-health>; see also Abigail E. Cahill et al., *How Does Climate Change Cause Extinction?*, ROYAL SOC’Y (Oct. 17, 2012), <https://royalsociety.org/news/2012/climate-change-extinction/>.

<sup>55</sup> Dillard & Bajaj, *supra* note 48.

<sup>56</sup> See Gregory Michener et al., *The Remoteness of Democratic Representation*, PARTY POLITICS (2021); see also Carter Dillard, *Empathy with Animals: A Litmus Test*

requiring our systems to be actually inclusive of its subjects so that they can meaningfully participate, and hence ecocentric rather than anthropocentric, would have avoided much of the climate crisis which now threatens the system such “law” was meant to protect.<sup>57</sup> Surely there is no concept of law, including positivism, that would not require its obligations to actually relate to and ideally reflect the inclinations of its subjects, something dependent on their actuality, their quantities and qualities.<sup>58</sup>

The pathway forward is to treat an ecocentric future, and democracy where the average person maintains the quantitative and qualitative capacity to actually have an impact on the outcomes,<sup>59</sup> as the precondition for the legitimacy of any norms and to alter rights and obligations accordingly. This starts with family law and policy oriented around deep ecology and equity, as a pathway towards true animal law and protection.<sup>60</sup> This answers the otherwise open question left by many theorists,<sup>61</sup> of who the people should be that will actually carry animal-benefitting theories into action.

That pathway is animal protection in the most comprehensive sense because it actually includes the full biodiversity of nonhumans, as well as the future persons with whom they would interact. This is a pathway that could be bricked by an untold number of activists creating compelling narratives about the next big social movement, bottom up, limiting and decentralizing human power, rather than simply waiting for institutional change to come from the top down.<sup>62</sup>

*for Legal Personhood?*, 19 ANIMAL L. 1, 20–21 (2012); Joseph Raz, *The Social Thesis and the Sources Thesis*, in THE QUEST FOR THE DESCRIPTION OF THE LAW 27, 27–28 (2009).

<sup>57</sup> See William Brangham et al., *UN Releases Dire Climate Report Highlighting Rapid Environmental Degregation*, PBS NEWSHOUR (Feb. 28, 2022, 6:35 PM), <https://www.pbs.org/newshour/show/un-releases-dire-climate-report-highlighting-rapid-environmental-degradation>.

<sup>58</sup> *Id.*

<sup>59</sup> See *Human Rights and Democracy*, FAIR START MOVEMENT, <https://fairstartmovement.org/human-rights-democracy/> (last visited July 12, 2022); Carter Dillard, *A Simple Litmus Test for Democracy and Freedom*, 18(5) J. OF SOLIDARITY & SUSTAINABILITY (2022), <http://www.pelicanweb.org/solisustv18n05page8.html>.

<sup>60</sup> See Dillard, *supra* note 45; see also Phil Cafaro, *What is the Optimal Human Population? An Eminent Economist Weighs In*, OVERPOPULATION PROJECT (Mar. 8, 2021), <https://overpopulation-project.com/what-is-the-optimal-human-population-an-eminant-economist-weighs-in/>.

<sup>61</sup> See generally WILL KYMLICKA & SUE DONALDSON, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* (Oxford Univ. Press 2011).

<sup>62</sup> See Marina Bolotnikova, *Why the Anti-Factory Farming Movement Needs Direct Action*, CURRENT AFFAIRS (Mar. 14, 2022), <https://www.currentaffairs.org/2022/03/why-the-anti-factory-farming-movement-needs-direct-action>.

## II. CULTIVATING TRANSGENERATIONAL EMPATHY FOR ANIMALS AND HUMANS ALIKE

Recognizing that animal law in its current form is a misnomer, that animal rights and human rights are interdependent, and that the greatest potential for reducing suffering lies in a focus on long-term outcomes, this Article calls for the pursuit of policies that cultivate transgenerational empathy.

### a. *Why Focus on Human and Nonhuman Animals Alike?*

Any discussion of the “law as misnomer” must recognize that systematic, legalized exploitation of the most vulnerable by the legal and political systems is obviously not unique to nonhuman animals. And seeing as the oppression of vulnerable human beings by the most powerful institutions, and corporations in particular,<sup>63</sup> proliferates to this day, human rights advocates are wont to question why anyone would focus their energies on bettering the lives of nonhuman animals.<sup>64</sup> Empathy, however, is not a zero sum game; empathy for nonhuman animals begets empathy for vulnerable human beings, and vice versa.

Recently, increasing awareness of the interconnectedness of human, animal and ecosystem health has led to an integrative One Welfare approach. As the Islamabad High Court noted in the case of Kaavan the elephant, it is “obvious that neglect of the welfare, wellbeing of the animal species, or any treatment of an animal that subjects it to unnecessary pain or suffering, has implications for the right to life of humans.”<sup>65</sup> Court concludes that any violation constitutes an “infringement of the right to life of humans.”<sup>66</sup>

In particular, studies have found that ethical vegetarians and vegans have higher levels of empathy for humans and animals alike.<sup>67</sup> Humane education programs, for example, have “not only enhanced children’s attitudes towards animals...but this change generalized to

<sup>63</sup> See, e.g., *Tomasella v. Nestle USA, Inc.*, 962 F.3d 60 (1st Cir. 2020).

<sup>64</sup> See Natalie Proulx, *Is It Wrong to Focus on Animal Welfare When Humans Are Suffering?*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/learning/is-it-wrong-to-focus-on-animal-welfare-when-humans-are-suffering.html>.

<sup>65</sup> Saskia Stucki & Tom Sparks, *The Elephant in the (Court)Room: Interdependence of Human and Animal Rights in the Anthropocene*, BLOG OF THE EUR. J. OF INT’L L. (June 9, 2020), <https://www.ejiltalk.org/the-elephant-in-the-courtroom-interdependence-of-human-and-animal-rights-in-the-anthropocene/>.

<sup>66</sup> *Id.*

<sup>67</sup> See generally Massimo Filippi et al., *The Brain Functional Networks Associated to Human and Animal Suffering Differ among Omnivores, Vegetarians and Vegans*, 5 PLOS ONE 1, 1-9 (May 2010) (discussing brain responses to conditions of animal and human suffering between omnivores, vegetarians, and vegans).

a measure of human-directed empathy.”<sup>68</sup> Nor is this a new idea, with the father of the American public school system, Horace Mann, having emphasized the importance of compassion for animals as a precursor to human generosity: “From the youthful benevolence that rejoices to see an animal happy, one grows up into a world-wide benefactor, into the healer of diseases, the restorer of sight to the blind, the giver of a tongue to the dumb, the founder of hospitals.”<sup>69</sup>

By the same token, since our levels of empathy are largely contingent on the conditions in which we are born and raised,<sup>70</sup> children provided with the resources needed to thrive are more likely to be kind to the most vulnerable among us, both two and four-legged.<sup>71</sup> As one animal and child welfare scholar notes:

The introduction of new humans into the world matters to its nonhuman inhabitants. It matters both in terms of how many new humans come into the world, and who those new humans are: In particular, their propensity to eat, wear, experiment upon, hunt, torture, and occupy the habitats of nonhumans. To the extent those humans are not aware of, cannot understand, or do not comply with the norms that purport to control how they treat animals, the introduction of new humans into the world-- and who those humans are and will become--is what matters most of all.<sup>72</sup>

The right of wildlife to thrive is also interdependent with the right of future generations of humans to thrive. Obviously, wildlife requires food, water, cover, and space to survive. In the truest sense, future generations depend on these same “life requirements” to survive. This interdependence has become more readily apparent during the pandemic: the scientific community has repeatedly stressed, conserving biodiversity while reducing contact with humans can limit the spread

<sup>68</sup> Frank R. Ascione, *Children Who Are Cruel to Animals: A Review of Research and Implications for Developmental Psychopathology*, 6 ANTHROZOOS 226, 234 (1993).

<sup>69</sup> HORACE MANN, TWELVE SERMONS: DELIVERED AT ANTIOCH COLLEGE 121 (Kessinger Publ’g 2010).

<sup>70</sup> Nancy Eisenberg et al., *Prosocial Development*, in 2 THE OXFORD HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY: SELF AND OTHER 1 (Philip David Zelazo ed., 2013).

<sup>71</sup> See generally Carter Dillard, *Comprehensive Animal Rights*, FAIR START MOVEMENT (Mar. 15, 2022), <https://fairstartmovement.org/comprehensive-animal-rights/> (discussing the ways in which family planning is logically intertwined with animal rights).

<sup>72</sup> Dillard, *supra* note 56, at 20-21.



of pathogens that cause infectious diseases like COVID-19.<sup>73</sup> When we convert wilderness for industrialized exploitation, the plants and animals that survive are more likely to carry disease, their populations flourishing without predators and competitors.<sup>74</sup>

*b. Why Transgenerational Empathy?*

Focus on the cultivation of long-term, transgenerational empathy is largely a matter of necessity. That is, the kind of value change proposed by this Article requires decades, if not centuries to achieve, since societal values tend to be stable. By the same token, once society comes to better respect the rights of vulnerable humans and animals, that is likely to be a long-lasting change.

Second, there's the matter of sheer numbers: there will be far more animals (human and nonhuman) in future generations than exist today.<sup>75</sup>

Finally, protecting future generations has long been under-emphasized as a matter of law and policy. After all, "Future generations matter, but they can't vote, they can't buy things, they can't stand up for their interests."<sup>76</sup> In this way, future generations are, by definition, a voiceless group in need of protection.<sup>77</sup>

*c. Policies to Promote Transgenerational Empathy*

Empathy with, and/or prosocial behavior towards, vulnerable entities like nonhumans and future children necessarily entails ensuring future children, minimum levels of wellbeing, equitable positions relative to other persons, safe/healthy/natural environments, and civic capacities and effective voices in their democracies—the things that would free them from others. Ensuring these things, in turn, liberate nonhumans by creating smaller human families that would invest more in each child (including in the development of their empathy) and do so equitably. It's existential justice, for humans and nonhumans alike.<sup>78</sup>

<sup>73</sup> Natasha Gilbert, *More Species Means Less Disease*, NATURE (Dec. 1, 2010), <https://www.nature.com/news/2010/101201/full/news.2010.644.html>.

<sup>74</sup> Felicia Keesing et al., *Impacts of Biodiversity on the Emergence and Transmission of Infectious Diseases*, 468 NATURE 647, 652 (2010).

<sup>75</sup> See Benjamin Todd, *Which Problems in the World are the Most Pressing to Solve?*, 80,000 HOURS (Mar. 2017), <https://80000hours.org/career-guide/world-problems/>.

<sup>76</sup> *Id.*

<sup>77</sup> See generally JOEL FEINBERG, *THE RIGHTS OF ANIMALS AND UNBORN GENERATIONS* (Routledge, 1st ed. 2012).

<sup>78</sup> See generally *id.*

The hallmark of "constituting"<sup>79</sup> future generations in ways where humans and nonhumans experience relative autonomy or the capacity for self-determination in a way that is aligned involves the physical limitation and decentralization of power through family planning reforms.

Assuming the nation in question is a human rights-based democracy, the state's interest in future persons is in ensuring all children a fair start in life and thus the creation and eventual emancipation of persons with the mutual capacity to be relatively self-determining.

To ensure that capacity we would have to start at some border of human influence, or nature/nonpolity—the nonhuman world, and maintain a neutral position so that as any particular group of persons grows the capacity for self-determination gives way (or is directly inverse) to the capacity for determination by others. To maintain the neutral position, at a certain range, the group in question has to divide. Knowing and acting according to that inversion is proof that people are free and equal, or that they matter politically, because their capacity to equally self and other determine is recognized.

For example, we would need to change family planning policies to minimize the impact climate related heat rises have on infants and their self-determination.<sup>80</sup> We would have to ensure smaller families creating less emissions, in which each child had health care sufficient to mitigate the harm—perhaps by targeting those responsible for the crisis to pay for family planning incentives/entitlements and care. And those children would have to be raised capable of eventually constituting autonomous political units, if they chose to do so, the sort where people are empowered to prevent crises like the climate crisis from occurring in the future.<sup>81</sup>

The simplest analogy for such groups of truly, but relatively, self-determining people would be the notion of functional constitutional conventions convening in a sea biodiverse nature, whose numbers are pegged to historic representative ratios such that voices are meant to matter.<sup>82</sup> This vision reflects the fact that the ultimate orders of human power are not lines on a map, but bodies and their influence. Not limiting the right to have children to account for this interest, or the interests of the future child, is like a room full of people where not all are permitted to speak. Those speaking feel free to do what they like, but the total quantity of autonomy is reduced.

<sup>79</sup> See Carter Dillard, *Constituting Over Constitutions*, 6 U. BOLOGNA L. REV. 48, 48 (2021).

<sup>80</sup> See Colin D. Butler et al., *Climate Change and Human Health*, in SUSTAINABILITY AND THE NEW ECONOMICS 51, 51-68 (2022).

<sup>81</sup> See Dillard, *supra* note 56, at 20.

<sup>82</sup> See Michener et al., *supra* note 56.

There are no obligations that precede the obligation to maintain this neutral position—in other words, the obligation to ensure all children ecosocial fair starts in life. A system is fair and obligatory when it goes all the way back—or fully accounts for its power. We are skipping a crucial step if we don't do this. And adhering to obligations, like honoring government issued property rights to wealth before using that wealth to create people in a fair way, would thus be being dishonest.<sup>83</sup> The owners of that wealth would have never paid the price of freedom in terms of orienting from a system of relatively self-determining people capable of setting the rules that then set market costs and benefits. Such people never come from a just place by fully accounting for the power of the system in which they live. In other words, maintaining ourselves as a consensual “We the People,” which is contingent on procreation (which acts almost as a first election of the ultimate source of political authority—the people) in a unique way, precedes the list of rights “we” might enjoy.

More specifically, this process involves redistributing wealth, and with it power, to ensure ecosocial fair starts in life for every child through devices like universal “small family” policies, significant baby bonds that could be used to incentivize fertility delay and parental readiness,. This would enable equitable investment in future generations. This is feasible, based on research regarding the efficacy of family planning incentives,<sup>84</sup> and would have a substantial impact on animal welfare—reductions in total fertility and all of the impacts it has on the nonhuman world aside—by closing the massive gap between rich and poor that exists today.

Per a recent study “[i]n a country with large GDP but high-income inequality, a sizeable part of the population may struggle to meet such basic demands for life satisfaction, which would diminish overall public demand for stricter animal protection policies.”<sup>85</sup> This maximizes both freedom from others, and freedom to equitable and morally valuable<sup>86</sup> options in life, via a new peremptory creation norm.

This process of normal change around family planning entails a fairly clear pathway in law and policy, one that branches into institutional reforms, cultural (or social learning)<sup>87</sup> and direct action moves as well.

<sup>83</sup> See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002).

<sup>84</sup> See generally Sarah Bexell et al., *How Subsidizing Delayed Parenthood Will Let Children Lead the Way to a Fairer World*, 51 LOY. U. CHI. L.J. 1 (2020).

<sup>85</sup> Michael C. Morris, *Improved Nonhuman Animal Welfare Is Related More to Income Equality Than It Is to Income*, 16(3) J. OF APPLIED ANIMAL WELFARE SCI. 272, 272-93 (2013).

<sup>86</sup> See generally JOSEPH RAZ, *THE MORTALITY OF FREEDOM* (1986).

<sup>87</sup> See Albert Bandura, *The Evolution of Social Cognitive Theory*, in *GREAT MINDS IN MANAGEMENT: THE PROCESS OF THEORY DEVELOPMENT* 9 (2005).

It begins, not surprisingly, with revisions of erroneous soft law interpretations of the right to have children based on various provisions of the International Bill of Human Rights.<sup>88</sup> Those interpretations, ostensibly to prop up population growth-based economies in the late 20th Century, read the right as protecting unlimited choice for would-be parents to choose the timing, spacing, and number of children, instead of a future child-centric focus that cooperatively ensured parental readiness, smaller and more sustainable families, and a fair start in life for all kids.<sup>89</sup> The actual revision could start with informal statements by United Nations Secretary General on the need for reform. This is so given that the current model was adopted before the advent of the climate and other ecological crises, unprecedented levels of global inequality, new threats to what were assumed to be stable examples of human rights and democracy, and the Covid-19 pandemic.

That statement, and process of soft law revisions probably culminating in a more formal revision at the next world population conference,<sup>90</sup> could link to the simultaneous embracing of fair start family planning reforms by leadership at the United Nations Population Fund, Children's Convention governing bodies, and at the World Health Organization. The latter is especially crucial given the relationship between overcrowding, growth, the spread and impact of disease, and the exacerbated conditions that will cause the next pandemic.<sup>91</sup>

Within nations, the change could come through specialized legislation, both at the national and state and local level. Change through specialized legislation has four aspects. First, it shifts child care payments, child tax credits, baby bonds or comparable guaranteed minimum income schemes, and similar devices towards family planning incentives<sup>92</sup> that promote parental readiness,<sup>93</sup> minimum standards of welfare approaching equitable birth positioning, and a universal ethic of smaller and more sustainable families. Secondly, it links this programming to environmental reforms, like the proposed Green New Deal.<sup>94</sup> Thirdly, the shift also links the family planning

<sup>88</sup> See Dillard, *supra* note 56, at 21.

<sup>89</sup> *Id.*

<sup>90</sup> See J. Nalubega Ross, *Chapter One and Chapter Two from “Program of Action of the International Conference on Population and Development” (1994)*, by United Nations Population Fund, EMBRYO PROJECT ENCYCLOPEDIA (Jan. 15, 2021), <https://embryo.asu.edu/pages/chapter-one-and-chapter-two-program-action-international-conference-population-and-development>.

<sup>91</sup> See Anne McNicholas et al., *Overcrowding and Infectious Diseases—When will We Learn the Lessons of our Past?*, 113 N.Z. MED. J. 453 (2000).

<sup>92</sup> See Dillard, *supra* note 56, at 20.

<sup>93</sup> See Matthew Hamity, *The Human Right to a Fair Start in Life*, 7 CHILD & FAM. L.J. 109, 109 (2019).

<sup>94</sup> See Riccardo Mastini et al., *A Green New Deal Without Growth?*, 179 ECOLOGICAL ECON. 1, 2 (2021).



reforms to education policy, incentivizing planning that aligns with early childhood development and educational outcomes. Fourthly, the incentives are linked to the availability and subsidization of new contraceptives, (especially male contraceptives), and programming that includes default for use by all persons under specified ages.<sup>95</sup>

Beyond legislation, there are a variety of strategic impact litigation opportunities, such as the case pending before the Ninth Circuit described above. There is also imminent litigation challenging abortion bans based on the fair start rights of future generations,<sup>96</sup> challenges to National Environmental Policy Act regulations that blatantly failed to implement the Act's prioritization of population stabilization,<sup>97</sup> and using the legislation above to draw defensive challenges that will clarify *Skinner v. Oklahoma* and other key precedents.

Turning to institutional reform, both for-profit and non-profit institutions can shift toward supporting fair start family planning in their programming, and many, choosing to do the right thing, have edged towards doing so.<sup>98</sup> For those that have not, obstacles have been that public messaging from a variety of institutions, from socially conscious investment funds, companies reliant on their public goodwill, to massive charities who have made claims for years regarding the socially beneficial impact of their work, have in fact been misleading. Public messaging consistently omitted material information about the offsetting impacts of population growth on the efficacy of programming (most of which had no family planning elements). In some cases, these messages—many of which were used in fundraising campaigns—were blatantly false. This process enabled climate change denial and blocked reforms that could have been done years ago. Work in this area can be combined with campaigns urging divestment from industries lobbying for unsustainable pronatal policies and industries that are engaged in supporting public narratives about baby busts and underpopulation.<sup>99</sup> This can be done concurrently with investments in private funds that promote sustainable and equitable family planning that invest more in each child to produce long-run returns.

A more cultural level, following the social cognitive theory work of Albert Bandura,<sup>100</sup> public influencers, and role models can be urged

<sup>95</sup> See Mark Hathaway et al., *Increasing LARC Utilization: Any Woman, Any Place, Any Time*, 57 CLINICAL OBSTETRICS & GYNECOLOGY 718, 718-28 (2014).

<sup>96</sup> Carter Dillard, *Ready for Something Different? Fair Start Concept Changes Everything*, FAIR START MOVEMENT (Mar. 15, 2022), <https://fairstartmovement.org/texas-abortion-fight-a-new-way-forward/>.

<sup>97</sup> See 42 U.S.C. § 4321(1970).

<sup>98</sup> See *Sustainable Families: Surviving and Even Thriving During COVID-19*, FAIR START MOVEMENT (Mar. 22, 2022), <https://havingkids.org/tag/huggable/>.

<sup>99</sup> See *id.*

<sup>100</sup> See generally Bandura, *supra* note 87.

to step forward to promote and, in some cases, model fair start family planning. While several families have done so,<sup>101</sup> and some prominent persons have moved their messaging in this direction,<sup>102</sup> we have yet to see truly prominent icons break the taboo (ironically reinforced by static, short-run social justice movements) that surrounds family planning discussions.

At a more of a grassroots level, there are opportunities for smaller and more sustainable families to lead as a force for change, given the way pronatal policies discriminate against them and their children.<sup>103</sup> And finally, given that fair start is rightly treated as a peremptory norm—and perhaps *the* peremptory norm—there are a variety of civil disobedience and direct action tactics that would demonstrate the overriding nature of the claim. These include demonstrating its supremacy over existing property rights, especially the rights of those particular and culpable entities at the top of the economic pyramid whose wealth would have the greatest impact on furthering fair start reforms were it shifted to support them.<sup>104</sup>

### III. ANIMAL LAW AND SOCIAL JUSTICE IN THE SHORT-TERM

Given that long-term value change takes decades, if not centuries, animal advocates would be well advised to continue to push for reforms in the here and now that will lay the groundwork for more radical action in the future, while simultaneously transitioning animal advocacy toward a modern social justice movement.

#### *a. Circumventing Industry-Captured State Bodies Through Democratic Engagement*

By solely targeting corporate perpetrators of animal cruelty (as opposed to individual workers), and seeking justice through citizens rather than police and prosecutors, the movement may more easily transition to a social justice movement that speaks truth to power, while also better protecting the rights and welfare of billions of animals.

<sup>101</sup> See *The Model Up Close*, FAIR START MOVEMENT, <https://havingkids.org/featuredfamilies/> (last visited April 7, 2022).

<sup>102</sup> See, e.g., Ashley Berke, *Kate Middleton Speaks for Children's Rights to Equal Starts in Life*, FAIR START MOVEMENT (Dec. 28, 2020), <https://fairstartmovement.org/kate-middleton-speaks-out-for-all-childrens-right-to-an-equal-start-in-life-take-action/>.

<sup>103</sup> See *Are Small Families Subsidizing Larger and Less Sustainable Ones? Tell Us Your Story*, FAIR START MOVEMENT (Mar. 15, 2022), <https://fairstartmovement.org/are-subtle-funding-policies-hurting-your-familys-future/>.

<sup>104</sup> See Dillard, *supra* note 96, at 70-71, 73.

## i. Protections for Vulnerable Workers in Animal Industries

In a recent lawsuit by Animal Rescue and Protection League, advocates allege that Hudson Valley Foie Gras “violate[s] state and federal labor laws in their exploitation and abuse of migrant farmworkers, including sexual abuse and molestation of female workers by managers at HVFG’s farm, where hundreds of the migrants live in squalid conditions.”<sup>105</sup> Per the complaint: The New York State Senate official YouTube channel has the following video of former Senator Pedro Espada visiting HVFG on September 15, 2009.<sup>106</sup> In the beginning of the video, a female worker describes the sexual abuse perpetrated by her bosses at HVFG.<sup>107</sup> At 2:20 in the video, a local priest describes how owners Ginor and Yanay fired all the migrant farmworkers and brought in new ones when they complained about illegally low wages and other labor violations.<sup>108</sup> The workers had nowhere to go, and the local church had to house them in their basement. At 8:40, Senator Espada confronts HVFG manager Marcus Henley directly about the sexual abuse of workers occurring at HVFG.<sup>109</sup> Henley responds by calling the police and screaming at Senator Espada to leave HVFG’s property.<sup>110</sup> New York Times Op-Ed Columnist Bob Herbert wrote a column on June 8, 2009 called “State of Shame,” describing the horrific working conditions of the migrant workers at HVFG.<sup>111</sup>

Recognizing the overlapping interests of vulnerable and oppressed workers at factory farms with the abused animals at farms, it becomes obvious that undercover investigations that result in animal cruelty charges against a few workers, rather than the corporation and its executives, are simultaneously ineffective and unjust.<sup>112</sup>

Admittedly, advocacy for workers in animal industries can be complicated by the fact that animal lawyers seek to hold their bosses accountable, which could then lead to reduced profits and job loss. It is important that animal advocates continue to invest time and resources

<sup>105</sup> First Amended Verified Complaint at 16, Animal Prot. & Rescue League, Inc. v. Ginor, No. 20STCV34229 (Cal. Super. Ct. Sept. 16, 2020), [https://www.bryanpease.com/ginor?fbclid=IwAR3etexKQ0jCWuwQer0p-D7usHiuPkPR8K2vWVQQqrS-bxcby\\_8psWISEI](https://www.bryanpease.com/ginor?fbclid=IwAR3etexKQ0jCWuwQer0p-D7usHiuPkPR8K2vWVQQqrS-bxcby_8psWISEI).

<sup>106</sup> N.Y. Senate, *Senator Espada Talks to Farm Workers on a Duck Farm*, YOUTUBE (Sept. 15, 2009), <https://www.youtube.com/watch?v=qUOPYu8NNug>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Bob Herbert, *State of Shame*, N.Y. TIMES (June 8, 2009), <https://www.nytimes.com/2009/06/09/opinion/09herbert.html>.

<sup>112</sup> See generally JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT (2019).

into further development of efforts, like the Rancher Advocacy Program, which helps meat and dairy operations transition into ethical vegan operations.<sup>113</sup> Much like the Green New Deal aims to create new green jobs to compensate for the transition away from fossil fuels, animal advocates should prepare a Humane New Deal campaign. While the specifics of such a campaign are beyond the scope of this article, it stands to reason that the burgeoning market for “clean meat” and plant-based alternatives would create new opportunities for workers previously employed in the animal industries. Given the mammoth size of the animal industries, replacing those jobs would not happen overnight, but the converse is true as well: the elimination of these industries will be a slow process, requiring decades to be sure.

## ii. Eliminate Exemptions for Standardized Industry Cruelty and Create Private Civil Rights of Action under the Cruelty Law via Ballot Initiatives

In the face of pervasive corporate capture of agencies, legislators, and prosecutors by the animal torturing industries,<sup>114</sup> animal advocacy organizations may have felt compelled early in the movement to make a “deal with the devil,” focusing instead on the lower hanging fruit of harsher punishments of individual abusers of companion animals. As Professor Justin Marceau notes, “a full one-third of the states with exemptions for factory farming practices enacted these exemptions in conjunction with passing their felony [animal cruelty] laws.”<sup>115</sup>

The time has come to right that wrong by shifting the focus away from individual offenders, and instead targeting standardized, corporate cruelty via repeal of the statutory exemptions. While it is true that standardized, corporate cruelty is treated as impliedly exempt by prosecutors even in those states without explicit statutory exemptions,<sup>116</sup>

<sup>113</sup> Home Page, RANCHER ADVOCACY PROGRAM, <https://rancheradvocacy.org/> (last visited July 12, 2022).

<sup>114</sup> See Drutman, *supra*, note 19.

<sup>115</sup> MARCEAU, *supra* note 112, at 104.

<sup>116</sup> Minnesota, for example, provides no statutory exemptions to its anti-cruelty laws; as in New York, the word “unjustifiable,” does all the work of immunizing standard industry practices in Minnesota, with prosecutors presuming that standard industry practices are *ipso facto* “justifiable.” See MINN. STAT. § 343.21. “No person shall overdrive, overload, torture, cruelly beat, neglect, or unjustifiably injure, maim, mutilate, or kill any animal.”). Additionally, Mississippi, has no statutory exemptions to its animal cruelty laws, with qualifiers such as “unjustifiably,” “cruelly,” and “needlessly,” apparently immunizing the standard industry practices. MISS. CODE ANN. § 97-41-1 (“if any person shall intentionally or with criminal negligence override, overdrive, overload, torture, \*torment, unjustifiably injure, deprive of necessary sustenance, food, or drink; or cruelly beat or needlessly mutilate; or cause or procure

eliminating statutory exemptions for standardized cruelty allows for the cultivation of a new legal and moral baseline, where the burden shifts to the industry to prove a particular practice “un-cruel,” in both the normative and legal senses. \*Conversely, providing an explicit statutory exemption has ceded the definition of animal cruelty entirely to industry, i.e. the very perpetrator of said cruelty.\* In the United Kingdom, a court specifically rejected that approach because “[t]o do so would be to hand the decision as to what is cruel to the food industry completely, moved as it must be by economic as well as animal welfare considerations.”<sup>117</sup> When McDonald’s sued English animal advocates for defamation after the advocates accused the corporation of animal cruelty and torture, the Court concluded that, “McDonald’s [was] responsible for torture and murder.” The Court added that “[o]f course the commercial urge to rear and slaughter as many animals as economically and therefore quickly as possible may lead to cruel practices...which could be avoided if less attention was paid to profit and high production and more to animals.”<sup>118</sup> In the U.S., McDonald’s could simply have pointed to the various statutory exemptions for standard factory farming practices, making their defamation case substantially stronger.

Currently, a ballot initiative in Oregon (“IP 13”) is underway for the 2024 election that proposes repealing Oregon’s statutory exemptions to the anti-cruelty laws for, “[a]ny practice of good animal husbandry[;]” “[t]he treatment of livestock being transported by owner or common carrier;” “[a]nimals involved in rodeos or similar exhibitions;” “[c]ommercially grown poultry;” “[t]he killing of livestock according to the provisions of ORS 603.065 (Slaughter methods);” “[l]awful fishing, hunting and trapping activities;...[w]ildlife management practices under color of law;” “[l]awful scientific or agricultural research or teaching that involves the use of animals;...[r]easonable activities undertaken in connection with the control of vermin or pests; and...[r]easonable handling and training techniques.”<sup>119</sup>

Under Oregon’s initiative petition process, IP 13 organizers must gather the 112,020 signatures needed to get the initiative onto

to be overridden, overdriven, overloaded, tortured, unjustifiably injured, tormented, or deprived of necessary sustenance, food or drink.”).

<sup>117</sup> Chief Justice Bell, *The Verdict Section 8: The Rearing and Slaughtering of Animals*, McSPOTLIGHT (Oct. 18, 2003), [https://www.mcspotlight.org/case/trial/verdict/verdict8\\_sum.html](https://www.mcspotlight.org/case/trial/verdict/verdict8_sum.html).

<sup>118</sup> *Id.*

<sup>119</sup> David Andrew Michelson, *Abuse, Neglect, and Assault Exemption Modification and Improvement Act*, OR. SEC’Y STATE ELECTIONS DIV., [https://egov.sos.state.or.us/elec/web\\_irr\\_search.record\\_detail?p\\_reference=20220013..LSCYYYABUSE,\\_NEGLECT,\\_AND\\_ASSAULT\\_EXEMPTION\\_\\_MODIFICATION\\_AND\\_IMPROVEMENT\\_ACT](https://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20220013..LSCYYYABUSE,_NEGLECT,_AND_ASSAULT_EXEMPTION__MODIFICATION_AND_IMPROVEMENT_ACT) (last visited April 4, 2022) (providing the ballot initiative was withdrawn on March 28, 2022).

the November 2024 ballot.<sup>120</sup> Should the initiative pass, the cruelty law would prove far more difficult for prosecutors to treat as having implied exemptions than in New York, Minnesota, and Mississippi, as the Oregon statute lacks any qualifiers along the lines of “*unjustifiably* injury,” or “*maliciously* kill,”; rather “intentionally caus[ing] physical injury to an animal” is sufficient.<sup>121</sup> The language of a previous version of the ballot initiative (since withdrawn) was recently amended *at the urging of the animal industries* to specify that its enactment would criminalize “killing for food, hunting, fishing.”<sup>122</sup> Industry groups sought the change to emphasize the wide-ranging effects of the initiative in the hopes of deterring signers. Ironically, however, the clarifying language will make it next to impossible for prosecutors and courts to find the intent of the bill was not to criminalize standard industry practices.<sup>123</sup>

Unfortunately, even if the initiative passes, Oregon is highly unlikely to become a “sanctuary state for animals,” as author of the initiative, David Michelson hopes.<sup>124</sup> The Oregon legislature could seek to overturn the initiative, as occurred in Missouri after voters passed an initiative banning puppy mills.<sup>125</sup> And indeed, Oregon is one of eleven states in which the Legislature may repeal a voter initiative by simple majority.<sup>126</sup> While proponents of the initiative may take solace in in a 2010 survey that found 89% of Oregon legislators disagreed that “Legislators should feel free to displace content and try to move policy outcomes closer to ones they prefer,”<sup>127</sup> legislators may feel differently toward a bill with this kind of impact on animal exploiting industries.

In Colorado, activists proposed a more narrow ballot initiative, which would have eliminated statutory exemptions for animal agriculture standard practices, while leaving the exemptions for research and pest and predator control intact.<sup>128</sup> The initiative would have mandated the

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Jeff Rice, *Anti-Livestock Initiative Petitions Now Circulating in Oregon*, J.-ADVOC. (May 4, 2021), <https://www.journal-advocate.com/2021/04/30/anti-livestock-initiative-petitions-now-circulating-in-oregon/>.

<sup>125</sup> When Missouri voters passed a ban on puppy mills, Missouri legislators promptly overturned the voter initiated ban. See Associated Press, *Missouri Legislators Undo Puppy Mill Law*, WASH. TIMES (Apr. 14, 2011), <http://www.washingtontimes.com/news/2011/apr/14/missouri-legislators-undo-puppy-mill-law/>.

<sup>126</sup> Kathleen Ferraiolo, *State Legislative Response to Direct Democracy and the Politics of Partial Compliance*, AM. REV. OF POL. 31, 41-64 (2010).

<sup>127</sup> *Id.*

<sup>128</sup> See Colorado State Ballot Initiative, *Protect Animals from Unnecessary Suffering and Exploitation*, COLO. SEC’Y OF STATE (Feb. 22, 2021, 12:40 PM), <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2021-2022/16OriginalFinal.pdf>.



slaughtering of farmed animals only occur if an animal had lived a quarter of its natural lifespan, as well as redefined what constituted a “sexual act with an animal,” to include artificial insemination.<sup>129</sup> However, the Colorado Supreme Court rejected the measure, finding that it violated the State’s “single subject” requirement, because “expanding the definition of ‘sexual act with an animal’ isn’t necessarily and properly connected to the measure’s central focus of incorporating livestock into the animal cruelty statutes.”<sup>130</sup> Colorado’s Democratic governor, Jared Polis, came out in opposition to the initiative, stating he “stands in solidarity with Colorado farmers and ranchers in opposition to the PAUSE ballot initiative because it would hurt Colorado and destroy jobs.”<sup>131</sup> It is now up to the proponents of the initiative to decide whether to revise the title in keeping with the Court’s holding. Should the initiative ultimately pass, the Legislature may repeal it by majority vote, much like Oregon.

Even if the Colorado or Oregon initiative passes and is not repealed by the Legislature, enforcement of the laws will face key obstacles. That is, while the initiatives may be clear in their criminalization of categories of standard industry practices, prosecutors would still have the discretion to not enforce the law, much as California prosecutors did not do so in the case of California’s 597t minimum exercise requirement, and as prosecutors in Minnesota do not enforce its similar requirement that “[n]o person shall keep any cow or other animal in any enclosure without providing wholesome exercise and change of air.”<sup>132</sup> Additionally, Oregon’s ban on animal slaughter could potentially be preempted by the Federal Meat Inspection Act.<sup>133</sup>

The preliminary lessons, then, from Oregon’s IP 13 and Colorado’s Initiative 16, are that advocates should (1) seek passage of the initiative in a state that does not allow the Legislature to repeal initiatives, such as California and Washington, and (2) include a private right of action as part of the initiative, thereby circumventing industry-captured prosecutors.

That the country is far from ready for legislation as far-reaching as Oregon’s IP 13 and Colorado’s Initiative 16 is underscored by the fact that no national animal advocacy organizations have come out in support of either one.<sup>134</sup> This may be due to fear that the bill is too

<sup>129</sup> *Id.*

<sup>130</sup> See In Re Title, Ballot Title & Submission Clause for 2021-2022 #16, 489 P.3d 1217, 1225 (Colo. 2021).

<sup>131</sup> See John Aguilar, *Animal Cruelty Ballot Measure Is Invalid, Colorado Supreme Court Rules*, DENVER POST (June 21, 2021, 1:49 PM), <https://www.denverpost.com/2021/06/21/animal-cruelty-livestock-colorado-ballot-measure-initiative-16-invalid/>.

<sup>132</sup> MINN. STAT. ANN. § 343.21.

<sup>133</sup> See *National Meat Ass’n v. Harris*, 565 U.S. 452 (2012).

<sup>134</sup> Tim Hearnden, *National Animal Groups Shun Oregon, Colorado Initiatives*,

extreme, driving away those in the “middle ground of public opinion.”<sup>135</sup> Alternatively, the national organizations may simply expect that the initiative is likely to fail, and therefore do not want to be associated with a losing cause.

Seeing as numerous national animal organizations specifically decry the statutory exemptions under the cruelty laws for standard industry practices, it seems more likely that the mainstream animal protection movement could get behind an iteration of the Oregon initiative that eliminates exemptions but adds a “justifiable” qualifier, so that it would be up to a jury to decide which standard industry practices are indeed cruel. If such an initiative were combined with a private right of action, this would allow advocates to challenge extreme forms of cruelty that juries may reasonably find to be cruel (regardless of the profitability of such cruelty), such as that previously discussed in foie gras production, as well as, for example, molting,<sup>136</sup> maternal deprivation experiments, toxicity testing, Draize tests,<sup>137</sup> confined without access to the outdoors, surgery without anesthetic (e.g. debeaking, castration, tail docking, etc), and solitary confinement).

In order to ensure that the private right of action could go before a jury rather than a judge, the cause of action would have to be civil (lest the criminal corporate defendant be able to opt for a bench trial). This could be in the form of a civil analogue to the cruelty statute, as exists in North Carolina (and discussed further *infra*.)

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FARM PROGRESS (Apr. 28, 2021), <https://www.farmprogress.com/livestock/national-animal-groups-shun-oregon-colorado-initiatives>.

<sup>135</sup> LYLE MUNRO, *COMPASSIONATE BEASTS: THE QUEST FOR ANIMAL RIGHTS* 101 (2001).

<sup>136</sup> Molting has traditionally been induced by withdrawing feed from four days to as long as two weeks. Recognizing the cruelty of this practice, the United Egg Producers guidelines now state that only non-feed-withdrawal molt methods—such as using specialized feed for non-producing hens and minimizing exposure to light—will be permitted for United Egg Producers (UEP) members. That being said, adherence to UEP guidelines is voluntary. See *Guidelines for Cage Housing*, UNITED EGG PRODUCERS CERTIFIED 10 (2017), [https://uepcertified.com/wp-content/uploads/2021/08/Caged-UEP-Guidelines\\_17.pdf](https://uepcertified.com/wp-content/uploads/2021/08/Caged-UEP-Guidelines_17.pdf).

<sup>137</sup> Courts have held that states and localities may prohibit even those activities for which a particular person holds an AWA license, so long as (1) the law does not interfere with the animal welfare purpose of the Act (i.e. “to foster humane treatment and care of animals”), and (2) it is not “physically impossible to comply with both the federal and local regulations.” See *DeHart v. Town of Austin*, 39 F.3d 718, 720 (7th Cir. 1994) (upholding “total prohibition” on possession of exotic or wild animals, despite plaintiff being licensed under the AWA as a dealer whose business includes the purchase and/or resale of wild or exotic animals); *N.Y. Pet Welfare Ass’n, Inc. v. City of New York*, 850 F.3d 79, 88 (2d Cir. 2017) (upholding law providing that City pet shops may obtain dogs or cats only directly from federally-licensed Class A breeders, despite plaintiffs having valid Class B animal dealers’ license).

- iii. Leverage Private Rights of Action to seek Corporate Liability for Standard Cruelty before a Jury, and Amend Codes to make Corporations more Liable for Cruelty

Given the difficulties of securing standing to challenge animal cruelty, and the reluctance of prosecutors to hold corporate offenders accountable, statutes that grant standing to any person or organization to halt animal cruelty via injunction is essential. North Carolina employs such a statute, though it is rife with exemptions for corporate cruelty.<sup>138</sup> Several other states allow limited private prosecution specifically for violations of animal abuse and neglect laws such as Wisconsin (allowing a humane officer to request law enforcement officers and district attorneys to enforce and prosecute violations of state law and cooperate in those prosecutions),<sup>139</sup> Minnesota (allowing a citizen to apply to any court with allegation of animal cruelty for a warrant and for investigation),<sup>140</sup> Pennsylvania (allowing an agent of any society or association for the prevention of cruelty to animals to have the same powers to initiate criminal proceedings provided for police officers and to have standing to request a court to enjoin a violation of animal cruelty laws),<sup>141</sup> and Hawaii (allowing an agent of any society for the prevention of cruelty to animals to make arrests and bring offenders before a judge).<sup>142</sup>

Of course, these statutes that limit powers to humane organizations have largely proven ineffective at addressing corporate cruelty. Hudson Valley Foie Gras, for example, is located in New York, where the ASPCA is empowered by statute to make arrests arising out of animal cruelty,<sup>143</sup> and yet, they have refused to act in spite of the documented animal cruelty at Hudson Valley.

New Jersey, however, provides a broader opportunity for a private right of action of a criminal violation:

If the board of chosen freeholders of a county or the governing body of a municipality fails to prosecute a claim or demand of the county or municipality, any court in which an action on such claim or demand is cognizable may, upon terms, allow a taxpayer and resident of the county or municipality to commence and prosecute an

<sup>138</sup> William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 *ANIMAL L.* 39, 41 (2005).

<sup>139</sup> WIS. STAT. § 173.07 (4M).

<sup>140</sup> MINN. STAT. § 343.22(1).

<sup>141</sup> 18 PA. STAT. ANN. § 5511(i).

<sup>142</sup> HAW. REV. STAT. § 711-1110 (2018).

<sup>143</sup> See N.Y. AGRIC. & MKTS. LAW § 37.

action upon the claim or demand in the name and on behalf of the county or municipality, if in the opinion of the court the interests of the county or municipality would be promoted thereby.<sup>144</sup>

This type of law may garner more support since it does not target animal cruelty specifically. If a separate cause of action specifically for animal cruelty is created, the North Carolina experience warns that exemptions may be created over time.<sup>145</sup> Enacting a more general statute that would still allow for private citizens to pursue claims of animal cruelty may ultimately protect the integrity of the criminal animal cruelty statute. In order for the New Jersey law to prove useful, it would need to eliminate the provision that allows for a court's discretion in determining if the private action would promote the interests of the county or municipality.

Challenges through private rights of action should initially target those states lacking explicit exemptions for standardized animal cruelty. HVFG would make the ideal target for animal lawyers going forward. The product is already illegal in NYC and California precisely because it is so obviously cruel. Moreover, foie gras is not a staple of working families, but a decadent "treat" for the rich. Importantly, any such action should not attack the workers, themselves victims of abuse, recognizing that powerful corporate executives should be held accountable, whereas the opposite is generally the case after undercover investigations of factory farms.<sup>146</sup>

Per the Model Penal Code (MPC) provisions for corporate liability, an advocate would need to prove that the cruelty "was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."<sup>147</sup> It is worth noting that ISE Farms in New Jersey was convicted for animal cruelty based on the neglect of hens who had been discarded by a farm employee on a pile of dead hens and left to die.<sup>148</sup> While the conviction was later overturned on other grounds, the issue of corporate liability

<sup>144</sup> N.J. STAT. ANN. § 2A:15-18 (WEST 2009).

<sup>145</sup> See generally Reppy, *supra* note 138.

<sup>146</sup> ALDF previously sought, through "Bella's Bill," to rehome New York's animal cruelty statute outside of the "Agriculture and Markets" title in the hopes of getting stronger enforcement. ALDF continues to push this bill, but it will do so with a focus on including corporate liability for animal cruelty and the addition of a private right of action. Unfortunately, courts have thus far rejected private rights of action under the cruelty code in New York. See generally *Hammer v. Am. Kennel Club*, 1 N.Y.3d 294 (N.Y. 2003). Foie gras is not produced elsewhere in the United States.

<sup>147</sup> MODEL PENAL CODE § 2.07(1)(c) (1962).

<sup>148</sup> *State of New Jersey v. ISE Farms, Inc.*, Transcript of Sup. Ct. Warren Co. (March 8, 2001).

was readily established under New Jersey's corporate liability statute.<sup>149</sup> The New Jersey statute is based on the MPC but differs slightly:

- a) A corporation may be convicted of the commission of an offense if:
  1. The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation unless the offense is one defined by a statute which indicates a legislative purpose not to impose criminal liability on corporations. If the law governing the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply;
  2. The offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
  3. The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.<sup>150</sup>

The first section of the New Jersey statute does not limit liability for agents acting within the scope of their employment and on behalf of the corporation to offenses outside of the criminal code.<sup>151</sup> While this is a small change from the MPC, it could have major implications for holding corporations and individual employees liable for animal cruelty. Because the State would not be confined to the third provision of the MPC for corporate liability which requires evidence that the corporation "recklessly tolerated" criminal animal cruelty.<sup>152</sup>

Finally, as a general matter, in pursuing private actions under the cruelty code, advocates should focus on those states that lack the federal standing requirements, such that an advocate may bring case on behalf of animal victims without alleging an injury on his or her behalf.<sup>153</sup>

<sup>149</sup> *Id.*

<sup>150</sup> N.J. STAT. ANN. § 2C:2-7 (West 2022).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *See, e.g.,* Nat'l Paint & Coatings Ass'n v. State, 68 Cal. Rptr. 2d 360, 365 (Cal. Ct. App. 1997); Nichols v. Kan. Gov't Ethics Comm'n, 18 P.3d 270, 276-

These changes could be combined with specific legislative reforms that would make prosecuting corporations for animal cruelty easier.

A model statute could have different types of acts be strict liability, for instance, misdemeanor animal cruelty, and could additionally note that acts of felony animal cruelty should impute to the corporation under traditional respondeat superior principles. This would allow prosecutors to bring charges against corporations for the most common acts of animal cruelty, those classified as misdemeanors, in a more straightforward application.

Some reform proposals in other contexts have included imputing only a strict liability or negligence standard for corporations to be held liable for criminal offenses. In a memo sent by the Deputy Attorney General to "all component heads and United States attorneys" in June 1999, it explicitly declares that "corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment."<sup>154</sup>

Examples of "organizational" liability include provisions in Part 2.5 of the Australian Commonwealth Criminal Code and art. 102(2) of the Swiss Penal Code. Each includes provisions for holding corporations directly liable for criminal offenses in circumstances where features of the organization of a corporation, including its 'corporate culture', directed, encouraged, tolerated, or led to the commission of the offense. This approach focuses on the corporation as an entity in and of itself and accepts the proposition that a corporation can be held blameworthy through its practices, policies, and procedures.

In April 2019, Warren introduced the Corporate Executive Accountability Act, S. 1010, 116th Cong. § 451 (2019). The bill, which was referred to the Committee on the Judiciary, would authorize prosecution of an executive officer of any corporation that generates more than \$1 billion in annual revenue for "negligently permit[ing] or fail[ing] to prevent" either a criminal or civil violation by the company. Thus, an executive could be criminally liable if the company he or she worked for committed a civil violation.

77 (Kan. Ct. App. 2001); Minn. Pub. Int. Rsch. Grp. v. Minn. Dep't of Labor, 249 N.W.2d 437, 441 (Minn. 1976); City of Picayune v. S. Reg'l Corp., 916 So. 2d 510, 525 (Miss. 2005); Animal Legal Def. Fund v. Woodley, 640 S.E.2d 777, 778 (N.C. Ct. App. 2007); Kellas v. Dep't of Corr., 145 P.3d 139, 141-42 (Or. 2006); Hous. Auth. of Chester v. Penn. State Civil Serv. Comm'n, 730 A.2d 935, 940-41 (Pa. 1999).

<sup>154</sup> Memorandum from Deputy Dir. Gen. to all Component Heads & U.S. Att'ys (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>.



Warren's bill provides that the corporation needs to either be convicted of or entered into a DPA or NPA related to the criminal violation of federal or state law for the executive to be criminally liable. It further states that an individual executive also may be prosecuted under the Act for any civil violation of federal or state law by his or her corporation if the corporation:

1. was found liable for such civil violation or entered into a settlement agreement with any federal or state agency regarding the violation; and
2. the violation affected the health, safety, finances, or personal data of not less than one percent of the population of either the United States or prosecuting state.

The bill is meant to target large corporations, and to penalize executives who play a role in the decision-making that leads to the corporations' civil and criminal offenses. By imputing similar liability to executives of corporations that commit animal cruelty, the law would better deter corporations and corporate executives from turning a blind eye to cruelty, incentivizing self-policing by imputing individual liability on top of corporate liability.

Working within current frameworks for general corporate criminal liability, one step forward would be to have more states adopt respondeat superior liability as opposed to the MPC § 2.07 provision. By utilizing the federal standard of liability, corporate liability is easier to impute on the basis that an agent was acting within the scope of employment, at least in part to benefit the corporation. While showing that cruelty "benefits the corporation" could still be difficult, it is easier than to show any involvement or knowledge of a high managerial agent.

One could argue that the processes and incentives in place make cruelty benefit the corporation. In current practice we see egregious cruelty prosecuted against individuals and not often against the corporation. However, systemic cruelty—the kind that is incentivized by the corporate structure, could be shown to benefit the corporation more directly. In terms of reform, while disparities exist between state and federal prosecutors, respondeat superior would certainly be a better place to start than the MPC § 2.07 provisions when working to prosecute corporations within a state for animal cruelty.

Finally, states that currently allow a compliance defense to corporate criminal liability provide another loophole for corporations to escape animal cruelty charges. Even if we look to move states to respondeat superior liability instead of MPC's narrow liability, we should include reforming the availability of this defense to corporations

facing charges. In practice, this loophole can provide corporations the ability to implement policies that do not target the underlying reasons or incentives for the cruelty that occurs in the corporate context. Therefore, staying within current frameworks for corporate liability, removing the availability of this defense for cases of animal cruelty will be crucial.

*b. Reification and Expansion of the Rights of Animals and Activists at the Local Level*

The importance of recognizing animal rights for their own sake, absent some benefit to human beings, has major importance for the future of animal law, both as a precedent that can be leveraged in future rights-based litigation, and as a way of shifting the way in which the aforementioned voters, jurors, etc. perceive animals to rights-bearers rather than beings upon whom we may treat with varying levels of empathy, limited by the extent to which that empathy may interfere with human desires. Absent a corresponding shift in the way in which society views animals, progress through democratic engagement has a utilitarian ceiling, i.e. a jury, while unaccountable to industry pressures and therefore unsusceptible to concerns about political donations, reelection, job security, corporate profitability, etc., will still reflect the overarching social values and customs, which remain deeply anthropocentric, if a contradiction in terms.<sup>155</sup>

*i. Codify Animal Rights, Some of which Already Exist*

When ALDF brought suit on behalf of Justice the horse in Oregon arising from injuries he suffered due to severe neglect, the circuit court held that "Justice lacks the legal status or qualifications necessary for the assertion of legal rights and duties in a court of law."

<sup>156</sup>In actuality however, and as ALDF contends on appeal, Justice, along with every other animal in Oregon, already has the "legal right" under

<sup>155</sup> See Cathy Siegner, *Survey: Most Consumers Like Meat, Slaughterhouses Not so Much*, FOODDRIVE (Jan. 25, 2018), <https://www.fooddrive.com/news/survey-most-consumers-like-meat-slaughterhouses-not-so-much/515301/> (noting a survey from Oklahoma State University which found that while more than 90% of U.S. consumers eat meat, 47% of them agreed with the statement, "I support a ban on slaughterhouses"); *New Poll Shows Majority Uncomfortable with Animal Farming Despite Eating Turkeys for Thanksgiving*, SCI. INST. (Nov. 20, 2017), <https://www.sentienceinstitute.org/press/animal-farming-attitudes-survey-2017> (noting a second survey that had nearly identical results).

<sup>156</sup> Or. Jud. Dep't, Wash. Cnty. Circuit Ct., Twentieth Jud. Dist., Opinion Letter re. Justice vs Gwendolyn Vercher (Sept. 17, 2018), <https://www.animallaw.info/sites/default/files/Justice%20the%20horse%20opinion%20letter.pdf> [hereinafter Justice Opinion Letter].

Oregon's cruelty statute not to be neglected or abused, including the right to adequate food, potable water, shelter, and veterinary care.<sup>157</sup> The same could be said of animals throughout the country under each state's respective cruelty statutes. Of course, the statutes do not specifically frame these statutes in terms of the animal's "right," but that right is implied by the corresponding duty of the human custodian or guardian.<sup>158</sup>

Given the court's reluctance to recognize Justice the horse's rights under the cruelty statute in Oregon, it would be prudent for advocates to draw upon explicit rights-oriented language in future animal-related legislation, i.e. "animals have the right not to be neglected and abused." Specifically confirming that animals have rights under state animal cruelty laws (limited though they may be), will prove helpful in efforts to expand those rights at the local level (as discussed in the next section).

## ii Establish Animal Personhood at the Local Level

As Justice Douglas noted in his *Wheeling Steel Corp. v. Glander* dissent, the definition of legal personhood has been stretched and reshaped by courts without coherent legal justification, with the Supreme Court engaging in "distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause."<sup>159</sup> When juxtaposed with the absurdity of over a century's worth of "make it up as you go" corporate personhood jurisprudence, the notion that animals, as rights-bearers, might be considered legal persons is not such a radical leap. Indeed, renowned legal scholars have recognized the sound legal basis for local ordinances that establish standing for persons to bring actions directly on behalf of nonhuman animal plaintiffs.<sup>160</sup>

<sup>157</sup> OR. REV. STAT. § 167.33(1)(1) (prohibiting criminally negligent failure to provide minimum care); OR. REV. STAT. § 167.322 (prohibiting maliciously killing or intentionally torturing an animal). The Court did not find it compelling that Oregon had amended the state's animal cruelty statute in 2013 to specifically highlight that the purpose of the law is to protect animals as "sentient beings capable of experiencing pain, stress and fear" who "should be cared for in ways that minimize pain, stress, fear and suffering." OR. REV. STAT. § 167.305(1), (2); see Justice Opinion Letter, *supra* note 156.

<sup>158</sup> Cetacean Cmty. v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004) ("[a]nimals have many legal rights, protected under both federal and state laws."); see also Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights) A Tribute to Kenneth L. Karst*, 47 UCLA L. REV. 1333, 1335 (2000) ("it is entirely clear that animals have legal rights, at least of a certain kind").

<sup>159</sup> *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 579 (1949).

<sup>160</sup> See, e.g., Steven M. Wise et al., *The Power of Municipalities to Enact Legislation Granting Legal Rights to Nonhuman Animals Pursuant to Home Rule*, 67 SYRACUSE L. REV. 31 (2017); Sunstein, *supra* note 158, at 1367.

Under California law standing can be created by local ordinance.<sup>161</sup> Alternatively, a city might reclassify animals as "sentient beings,"<sup>162</sup> replacing all references to ownership and possession of dogs and cats in the municipal code with "guardianship" and "custody."

## iii. Protect and Expand the Right to Document Animal Cruelty and Rescue Animals

In addition to eliminating statutory exemption for standardized cruelty and establishing private rights of action to hold corporations accountable, it is vital that advocates continue to defend and expand the right to document corporate cruelty, otherwise corporations will be able to hide said cruelty behind closed doors. ALDF has joined with a coalition of advocacy organizations in challenging ag-gag laws in court to great success, with ag-gag laws ruled unconstitutional on free speech grounds in Kansas, North Carolina, Wyoming, Idaho, Utah, and Iowa (twice), a challenge of Arkansas' ag-gag statute currently before the Eighth Circuit.<sup>163</sup>

While documenting animal cruelty by corporations, advocates invariably come upon animals in need of urgent veterinary care. In some instances, advocates have rescued those animals, and have subsequently faced felony charges for trespass and theft. The notion that concerned individuals have a right to rescue sick or dying animals has basis in law, albeit in limited circumstances. Several states already have codified the right to rescue animals from "hot cars," so long as the person notifies law enforcement. And while most of these "hot car" laws are limited to the

<sup>161</sup> California is not subject to the federal standing requirements as the California Constitution contains no "case or controversy" requirement. See, e.g., *Nat'l Paint & Coatings Ass'n v. State*, 58 Cal. App. 4th 753, 761 (Cal. Ct. App. 1997) (rejecting claimed standing requirement based on federal citations, noting that the California Constitution "contains no 'case or controversy' requirement").

<sup>162</sup> While not going so far as to explicitly remove animals from the property paradigm, Oregon has declared via statute that animals are "sentient beings capable of experiencing pain, stress and fear." OR. REV. STAT. § 167.305(1) (2017).

<sup>163</sup> Nicole Pallotta, *Though Ruled Unconstitutional, Industry Continues Pushing Ag-Gag Laws: Updates in North Carolina, Kansas, Iowa, and Ontario*, ANIMAL LEGAL DEF. FUND (Sept. 15, 2020), <https://aldf.org/article/though-ruled-unconstitutional-industry-continues-pushing-ag-gag-laws-updates-in-north-carolina-kansas-iowa-ontario/>.



rescue of companion animals, California,<sup>164</sup> Ohio,<sup>165</sup> and Massachusetts<sup>166</sup> each allow for private persons to rescue any animal victim in imminent danger from a vehicle.<sup>167</sup> Washington<sup>168</sup> and California<sup>169</sup> allow persons to provide aid to animals impounded or confined without necessary

<sup>164</sup> California grants civil immunity for any person who takes reasonable steps to remove an animal from a vehicle if that animal's "safety appears to be in immediate danger from heat, cold, lack of adequate ventilation, lack of food or water, or other circumstances that could reasonably be expected to cause suffering, disability, or death to the animal," and that person calls law enforcement after entry. CAL. CIV. CODE § 43.100 (2017). In addition, California grants criminal immunity if that person takes specific steps first, such as contacting law enforcement, has a good faith belief that entry is necessary, remains with the animal in a safe location, and uses only as much force as necessary. CAL. PENAL CODE § 597.7(b) (2017).

<sup>165</sup> Ohio grants civil immunity for damage resulting from forcible entry of a vehicle "for the purpose of removing an animal" or a minor from the vehicle if certain conditions are met, including having a good faith belief that the animal is in imminent danger, making a good faith effort to call 9-1-1 before entry, not using more force than is reasonably necessary, and making a good faith effort to leave notice on the vehicle's windshield about the reason for entry into the vehicle. OHIO REV. CODE ANN. § 959.133(a) (2016).

<sup>166</sup> Massachusetts grants civil and criminal immunity for entering a motor vehicle to remove an animal if certain requirements are met, such as making reasonable efforts to locate the vehicle owner and notifying law enforcement. MASS. GEN. LAWS ANN. ch. 140, § 174F (West 2018).

<sup>167</sup> To the extent that the 28 Hour Law might preempt these state "hot car" laws as to farmed animals, advocates could nonetheless advocate that persons leverage these laws to rescue poultry, since the statute does not protect it. *See* 49 U.S.C. § 80502.

<sup>168</sup> WASH. REV. CODE ANN. § 16.52.100 (West 2020) ("If any domestic animal is impounded or confined without necessary food and water for more than thirty-six consecutive hours, any person may, from time to time, as is necessary, enter into and open any pound or place of confinement in which any domestic animal is confined, and supply it with necessary food and water so long as it is confined. The person shall not be liable to action for the entry, and may collect from the animal's owner the reasonable cost of the food and water."). While "domestic animal" is not explicitly defined, the term refers to farmed animals in other sections of this chapter. *See* WASH. REV. CODE ANN. § 16.52.110 (West 2020) ("Every sick, disabled, infirm, or crippled horse, ox, mule, cow, or other domestic animal."); WASH. REV. CODE ANN. § 16.52.095 (West 2020) ("It shall not be lawful for any person to cut off more than one-half of the ear or ears of any domestic animal such as an ox, cow, bull, calf, sheep, goat or hog, or dog.").

<sup>169</sup> CAL. PENAL CODE § 597e (Deering 2022) ("In case any domestic animal is at any time so impounded and continues to be without necessary food and water for more than 12 consecutive hours, it is lawful for any person, from time to time, as may be deemed necessary, to enter into and upon any pound in which the animal is confined, and supply it with necessary food and water so long as it remains so confined. That person is not liable for the entry and may collect the reasonable cost of the food and water from the owner of the animal, and the animal is subject to enforcement of a money judgment for the reasonable cost of such food and water.").

food and water. Animal lawyers should be prepared to defend activists who act to protect animals under these laws, an undertaking that might include leveraging the necessity defense in instances where activists rescued sick or dying animals.<sup>170</sup>

<sup>170</sup> *See, e.g.,* Jenni James, *When is Rescue Necessary? Applying the Necessity Defense to the Rescue of Animals*, 7 STAN. J. OF ANIMAL L. & POL'Y 1 (2014).

## **A Chimp's Day in Court: Inside the Historic Demand for Nonhuman Rights**

**ON THE MORNING** of December 2, a lawyer named Steve Wise and three other members of the Nonhuman Rights Project walked up the steps of the Fulton County Courthouse in Johnstown, New York and into the annals of history.

In Wise's hands was a lawsuit demanding something unprecedented in American law: formal recognition that a 26-year-old chimpanzee named Tommy, kept alone in a cage in a local warehouse, is a person, possessing a legal right to bodily liberty previously reserved for humans.

One day later, Wise delivered a similar lawsuit in Niagara Falls, on behalf of Kiko, a chimpanzee living in the home of a couple who purchased him 20 years ago from an Ohio ice cream parlor. Two days after that, Wise filed suit on Long Island, claiming freedom for Hercules and Leo, two chimps used in locomotion studies at Stony Brook University and owned by the New Iberia Research Center, a facility infamous for the abuse of its animals.

What Wise and the members of his Nonhuman Rights Project assert is both simple and radical: that personhood – the legal prerequisite for having rights of any sort at all – should no more be based on species classification than it is on skin color. Instead, the lawsuits argue that personhood derives from cognitive and emotional qualities that chimpanzees, like humans, possess in abundance.

Tommy and Kiko and Hercules and Leo are not humans, acknowledges Wise, deserving full human rights. They shouldn't have a right to vote, or to enter a restaurant or a public school. But they and every other captive chimpanzee are enough like us to have a right not to be owned and imprisoned against their will. If it's not realistic to release them into a wild they've never known, they might be sent to chimpanzee sanctuaries, free to live with a modicum of the liberty they deserve. Not because we've deigned to be nice to them, but because it's their right.

Whether a judge will agree remains to be seen, and most legal scholars, even those who support the case, think it's unlikely. Never in the history of western law have ideals of liberty and equality been formally applied to an animal other than *Homo sapiens*. Judges don't like being radical. The lawsuit also raises what many consider an unacceptably impractical possibility: personhood demands filed on behalf of not only chimpanzees, but animals used in research and on farms, or living in our landscapes.

Legal implications aside, however, the argument for chimpanzee personhood draws on decades of scientific research on humanity's closest living relative. And where the argument turns from law to science, the Nonhuman Rights Project's claims are backed with affidavits filed by nine of the world's leading primate researchers, describing in exhaustive detail the scientific evidence for regarding Tommy, Kiko, Hercules and Leo as extraordinarily complex, self-aware and autonomous creatures comparable in many ways to ourselves.

Such information has previously been applied to questions of welfare, to cage sizes and research justifications, but not to fundamental legal questions of personhood. Yet this is where the science points, and though many people dismiss these claims as quixotic and

impractical, Wise and his compatriots are following scientific fact to an arguably logical legal conclusion.

It's still entirely possible that the lawsuits will be dismissed without Wise opening his mouth in a New York courtroom. But it's also possible that a judge will at least agree to hear their case. If and when that happens, a chimpanzee will finally have his day in court. "It doesn't matter if you're a human or a chimp," said Wise. "If you have the cognitive capacity to live life as you choose, you should be able to do that. Your species is completely, completely irrelevant."

### **Aristotle's Animate Windshields**

The lawsuit is the culmination of a legal strategy seeded three decades ago, when Wise was practicing animal protection — or, as he prefers to say, animal slave — law in Massachusetts. He litigated hundreds of cases, ranging from the unusual mistreatment of dogs and cats to more unusual lawsuits: attempts to stop deer hunts, the transfer of a dolphin from the New England Aquarium into sonar research with the U.S. Navy.

Sometimes, as when an especially egregious abuse violated local animal cruelty statutes, Wise would win. But often his lawsuits were dismissed by judges who argued that Wise couldn't sue on behalf of animals he or his clients didn't personally own. In legal terms, they lacked standing: the ability to show how humans would suffer from the mistreatment of an animal.

It might sound illogical that an animal's suffering could be legally irrelevant unless it directly affects a human, but "these are the kinds of gymnastics that animal protection lawyers have to go through," said Wise during a September talk at George Washington University. "Nonhuman animals are legal things, and they have always been legal things. That means they're essentially invisible to our civil law."

Cruelty laws aside, some animal protections do exist, such as those for endangered species. Yet even those reflect the value society places on populations and species units. They say nothing about the personhood of an individual animal. And though individuality might be acknowledged in, say, requirements that research chimpanzees be given toys to play with, they reflect token generosity rather than any acknowledgement of an animal's essential personhood.



Loulis, who learned to use sign language from his adopted mother Washoe, the first chimpanzee taught to sign.

"The example I give is that I can take a baseball bat, and smash the window of your car, and I'll be charged with something," said Wise during the talk. "But the car or the windshield doesn't have legal rights. It's not a person. Essentially, a non-human animal is a kind of animate windshield. If I'm cruel to her, I can go to jail, but the non-human animal is a complete bystander to this. She doesn't have any rights."

Wise furthered the analogy with references to animals as legally equivalent to tables and chairs — language that, to anyone who knows a cat or dog, or really has any experience with animals whatsoever, will sound strange: animals are self-evidently not these things. Yet as Wise argues in [\*Drawing the Line\*](#), a 2002 book in which he articulated the legal and scientific framework of the lawsuits, western law's view of animals has been shaped by an intellectual tradition that might charitably be called ignorance, from Aristotle's proclamation that, just as slaves were made to serve their masters, so animals were made to serve humans, on through René Descartes' [characterization of animals as clockwork automata](#).

Whether this intellectual history is directly responsible for modern law's treatment of animals is a matter of debate for legal historians. The fact remains, though, that Tommy — whom Wise visited personally in October, under the guise of being curious about a herd of holiday-rental reindeer also kept at a trailer dealership run by Tommy's owner, and found alone in a newspaper-lined cement cage in a dank, cavernous warehouse with nothing to occupy his attention but a small color television — might as well be a windshield.

"There is no question this court would release Tommy if he were a human being," [read the documents](#). "There can be equally no doubt that Tommy is imprisoned for a single reason: despite his capacities for autonomy, self-determination, self-awareness, and dozens of other allied and connected extraordinarily complex cognitive abilities, he is a chimpanzee."

## **The Mind of a Chimpanzee**

Making a factual case for those capacities are [the affidavits filed by the nine scientists](#), whose expertise spans not only primatology but psychology, neuroscience, animal behavior, anthropology, cognition and learning theory. The scientists are not themselves members of the Nonhuman Rights Project, and the affidavits don't talk about law, only science. Gathered together, they amount to more than 200 pages of text and reference, reviewing hundreds of studies — not just their own, but from hundreds of other researchers — on dozens of cognitive, neurological and behavioral traits [*see sidebar for a complete list*].

Lawsuits aside, the affidavits are a veritable textbook of contemporary and historical chimpanzee research, and if conveying their full detail requires more space than a journalistic article affords, a few themes stand out. At a purely neurological level, chimpanzees share many of the same features — enlarged frontal lobes, asymmetry between left- and right-brain functions, specialized cell types in specific brain regions — associated with high-level cognition in humans.

Mary Lee Jensvold, an experimental psychologist and former director of the Chimpanzee and Human Communication Institute, who worked for 27 years with chimps taught sign language, [describes the conceptual richness](#) of their communicative abilities, which include symbolic thought, perspective-taking and references to past and future events, and the parallel manner in which these develop in both human and chimpanzee infants. These are evidence, say she and others, of deep cognitive similarities.

Similar parallels can be seen in brain development, writes Primatologist Tetsuro Matsuzawa of Kyoto University, current president of the International Primatological Society. He also discusses their [highly sophisticated numerical and sequencing abilities](#), which have been the subject of public fascination: chimps out-calculating human children, and [even college students](#)! These math skills, explains Matsuzawa, indicate the sophistication of memory systems considered central to planning and making decisions, rather than acting on instinct or automatic, stimulus-response conditioning.

Another series of well-known findings involve tool-making and cultural traditions, both of which were once thought to be uniquely human capacities. William McGrew, an evolutionary primatologist at the University of Cambridge, [describes how chimpanzees learn from one another](#) to make complex tools that resemble those used by Stone Age humans and even some surviving aboriginal groups. "The foraging kits of some chimpanzee populations, such as in western Tanzania, are indistinguishable in complexity from the tool kits of some of the simplest material cultures of humans, such as Tasmanian aborigines," McGrew writes.

Different methods of tool manufacture and use are considered hallmarks of distinct chimpanzee cultures, of which more than 40 exist in Africa. Cultures are also distinguished

by social traditions: McGrew recounts how the famed primatologist Jane Goodall, who sits on the Nonhuman Rights Project's Board of Directors, documented males of group she studies performing slow, rhythmic dances at the beginning of rain seasons. It's not unreasonable, Goodall says, to think these [might be rain dances](#).

Whether that's so is speculation, but the cognitive faculties underlying culture are not. In chimpanzees as in humans, writes McGrew, social learning requires emulation, imitation, and an ability to explain, all of which signify a sense of self. That's hardly not unique in the animal kingdom — even a cockroach [likely has self-awareness](#) — but there's reason to think that a chimpanzee's self-awareness is comparable to our own. Not only can chimpanzees only can recognize themselves in mirrors, which is considered a sign of sophisticated self-awareness; they also recognize photographs of themselves as youngsters.

Perhaps crucially, they're capable of "mental time travel," said Matthias Osvath, a cognitive zoologist Sweden's University of Lund. Known for his research on Santino, a chimpanzee who [makes elaborate plans to throw stones at zoo visitors](#), Osvath [describes mental time travel](#) as the ability to imagine oneself in the past and future, as well as the present. This capacity underlies an essential aspect of human experience, Osvath said: we engage in some form of it whenever our own thoughts stray from the immediate moment, and when we make plans.

It's this ability that produces the autobiographical, first-person sense we have of our own lives, and it could very well mean that Tommy is both aware of the misery of his situation and can contemplate a future of never-ending captivity. If so, that would not in itself be the grounds for the Nonhuman Rights Project's personhood claim: rather, it would be a facet of what the various capacities of chimpanzees, from complex memory and self-awareness to imagination and mental time travel, signify: autonomy.

As best as we can tell, Tommy and Kiko and Hercules and Leo don't live their lives according to a predetermined program. They can go to sleep at night thinking of what they might do the next day, then wake up and do it — or not. They live consciously, with full awareness and exercised choice.

This assertion, that the cognitive qualities enumerated amount to *autonomy*, is arguably a judgement that drifts away from established fact and towards a philosophical argument about the nature of autonomy. But as psychologist James King of the University of Arizona, former editor of the *Journal of Comparative Psychology*, [notes in his affidavit](#), autonomy isn't even something we can directly observe even in humans.

Rather, we judge it by behavior, and "evidence for autonomous behavior in humans is not seriously disputed," writes King. "In chimpanzees, the behavioral evidence for autonomy is not seriously disputed." And if we can't measure autonomy the way we can, say, gravity, it's the simplest explanation for what we can observe in chimpanzees.

A few decades ago, before most of this research was conducted, when editors at the journal *Nature* castigated Jane Goodall for referring to chimpanzees with gender-specific pronouns, such claims would have been deeply controversial. After all, noted Osvath, science too [had to](#)



[free itself](#) from the intellectual legacy of Aristotle and animals-as-machines. But the essential outlines are widely accepted.

To be sure, said Brian Hare, a Duke University evolutionary anthropologist who has studied cognition in chimpanzees and dogs, individual pieces of the cited research might still be debated, but over fine points of similarity and difference. "If you're talking about it in a quick way, all those statements are accurate, but in each of those categories where chimpanzees might be similar to us, there's different types of equivalence," Hare said.

In other words, a chimpanzee has an autobiographical sense of self, but does he spend as much time as we do contemplating its future? Does he experience autonomy the way we do? That we don't know for sure, but the Nonhuman Rights Project argument isn't for one-to-one equivalence, but rather substantive similarity. Indeed, that's essentially [the judgment passed by an Institute of Medicine committee](#) convened in 2011 to advise the National Institutes of Health on its use of chimpanzees in research: they're just too much like humans to use in harmful experiments unless there's an overwhelming, human life-saving reason to do so.

To all this, one might raise the question: Could a chimpanzee ask to be free? In the wild, where chimpanzees are known to communicate using abstract, symbolic gestures, that might indeed be possible, but Mary Lee Jensvold recalled a more germane story, involving chimpanzees trained to us sign language by Roger Fouts, the Chimpanzee and Human Communication Institute's founder, early in his career, when Fouts was still at the University of Oklahoma's Institute for Primate Studies.

The chimps were sold to the Laboratory for Experimental Medicine and Surgery in Primates in New York. Years later, one of Fouts' collaborators, Gonzaga University comparative psychologist Mark Bodamer, visited the laboratory. "He met the signing chimps," said Jensvold. "The chimps were signing. One of the technicians said, 'They're always doing that.' And one of the chimps signed, 'Key. Out.'"

### **Does a Person Need to Be Human?**

If the Nonhuman Rights Project's story were a movie, it would cut now to a montage of hotel conference rooms, take-out cartons and ever-growing piles of paper strewn around the project's principals. There's Wise, of course, his hair grayer and face more lined than in the dust-jacket photos of his books; Elizabeth Stein, Wise's intellectual sparring partner, who left financial law to defend animals; Monica Miller, a recent law school graduate who handles their legal database-dives and archive-searches; executive director Natalie Prosin, who does a little of everything; and, appearing via Skype on a laptop, Lori Marino, the Emory University neuroscientist who first showed that [dolphins could recognize themselves in mirrors](#).

Over the past two years, with volunteer help from dozens of animal law students and lawyers, the group analyzed the laws of all 50 states, plumbing the arcana of 19th-century slave cases and legal guardianship precedents, posing for each some 60 fine-print questions designed to identify the most legally hospitable state for their lawsuit. Earlier this year they picked New York, where courts have historically been generous in their willingness to hear personhood claims, and decided to bring suit on behalf of every chimp they could find.

Two of these, named Merlin and Reba, kept in a cage [at a zoo](#) in the upstate town of Catskills, died before the case was ready. Merlin was the second to die, three months after Reba, from complications resulting from an abscessed tooth. [According to the Nonhuman Rights Project](#), he spent the last several weeks of his life punching himself in the face. A third chimpanzee, a 28-year-old named Charlie, "[The Karate Chimp](#), who was owned by the same couple who own Kiko, [died in early November](#). The couple, Carmen and Christi Presti, run a self-described [primate sanctuary](#) previously known as [Monkey Business](#); they'd purchased Charlie as a 15-month-old, later teaching him karate and displaying him on TV shows including America's Funniest Home Videos and How I Met Your Mother.

The Christis did not respond to requests to be interviewed, nor did Tommy's owner, Patrick Lavery, or Stony Brook University, where Hercules and Leo are used in anatomist Susan Larson's [research on primate locomotion](#). Both are owned by the New Iberia Research Center, to which a third Stony Brook chimpanzee, named Carter, was [returned last August](#). A chimpanzee named Carter is also mentioned in a 2007 Humane Society [undercover investigation at NIRC](#), which has been [accused of illegally breeding chimps](#).

The HSUS allegations described several hundred NIRC chimpanzees living in barren, windowless concrete rooms, with literally nothing to do, sometimes in isolation and at other times packed into cages. Infants were routinely taken from their mothers shortly after birth; in the wild, they'd have nursed for five years, and remained with their mothers for several years after that. At NIRC, juveniles often displayed the compulsive rocking typical of abandoned human children. "Danielle gave birth to son Carter on 9/1/06," read the report. "Carter was taken from his mother so she could be bred again."

New Iberia was ultimately fined a pittance of \$18,000 for violating the Animal Welfare Act. This sort of treatment, and the institution of chimpanzee ownership that supports it, isn't just wrong, contends Wise. It *violates their rights*. To make that argument, he's appealing to common law, a body of jurisprudence distinct from Constitutional law — Wise doesn't argue, and has openly criticized the notion, that the 13th Amendment should apply to non-humans — and from statutory law, which is passed by legislatures. Common law is where everything else gets settled, and at least historically, it's where judges have the latitude to make and interpret law in keeping with changing social standards and scientific knowledge.

Personal injuries fall under the auspices common law. So do [rights to privacy](#) and inter-family disputes. It was also in a common-law court where a slave's personhood was legally recognized for the first time. That case, *Somerset v. Steuart*, took place in England in 1772, and is the subject of a book by Wise, [Though the Heavens May Fall](#), in which he details the legal arguments that convinced one of history's most influential jurists, Lord Mansfield, himself a slave-owner, that a runaway slave named James Somerset was a person with a right to be free.

That case and its arguments, including the legal strategy of filing a writ of habeas corpus, an ancient legal principle — it translates from Latin as, "show the body" — used to challenge unlawful imprisonment, was formative for Wise. It guides the Nonhuman Rights Project's lawsuits, which ask for writs of habeas corpus on behalf of the chimpanzees, and is among the dozens of cases and legal theories cited in their court documents.



These run from *Somerset v. Steuart* and *The Collected Works of Abraham Lincoln* to tomes of Roman civil law and *Lemmon v. People*, an 1852 case in which the New York Supreme Court allowed a dock worker to file habeas corpus writs on behalf of eight slaves held on a boat in New York harbor. That precedent, hopes Wise, will convince a judge that the Nonhuman Rights Project can represent the chimpanzees. They also quote John Chipman Gray, an influential late-19th and early-20th century legal scholar, who said that "personhood as a legal concept arises not from the humanity of the subject but from the ascriptions of rights and duties to the subject."

That is, in a formal nutshell, the essence of the Nonhuman Rights Project's argument: a person — an entity capable of possessing legal rights — does not need to be human. To a certain extent this has already been demonstrated by the legal personhood afforded to corporations and ships, but those are still human institutions. Wise is calling for personhood based purely on principle.

"Legal person has never been a synonym for 'human being,'" reads the lawsuit. "A free being such as Tommy, who possesses autonomy, self-determination, self-awareness, and the ability to choose how to live his life, must be recognized as a common law 'person.'" The rights to which Tommy is entailed, they stress, don't include nearly all the rights given to humans — he's not entitled to a free education or emergency health care — but by virtue of his autonomy, his capacity for self-determination, has a right not to be imprisoned.

This sort of right is technically known as a "dignity right," and Erin Daly, a Widener University School of Law professor who has written extensively about dignity rights, called their proposed grounding in autonomy "a reasonable and interesting argument," though unprecedented. "I don't know of anything that says, 'Anything with autonomy has dignity rights,'" she said — not because the idea has been rejected, but because nobody's yet made that case so explicitly.

"As a legal culture, we do care about autonomy. It's an important value in America, and more so in America than in other countries," Daly said. "I think that makes sense to test whether nonhumans should be accorded dignity rights in some way."

Should a judge feel uncomfortable with the idea that self-determination is an intrinsic basis for liberty, the lawsuit offers a related but subtly different argument, grounded instead in equality: the principle by which, if one person is similar to another, they are treated equally by the law. It's on this principle that rights for blacks, other racial minorities, women and non-heterosexuals have been granted — and not because they were necessarily considered the full equals of existing rights-holders, but because they were equal enough.

Likewise, even humans whose cognitive capacities are well below those of chimpanzees — people with severe mental disabilities, infants whose brains won't ever develop, adults with severe dementia — are granted some rights. They might be kept in institutions, or have certain decisions made for them, but they can't be owned or experimented upon. That isn't simply because they satisfy some arbitrary genetic standard, argues Wise, or qualify via legal

loophole for the protections of fully abled humans. It's because they have capacities of autonomy and selfhood, however limited, that we as a society value so deeply.

"We'll go in front of a judge and say, 'Whatever is the reason why a human being should have a right to bodily liberty, whatever trait they have, whatever characteristic they have, our chimpanzee has it too,'" Wise said. "You can name whatever you want. Our chimp has it too."

"The strength of Wise's case is that he's called the law into question on its fundamental values of dignity, equality and autonomy," said Paul Waldau, who teaches animal law and ethics at Harvard Law School. "He's saying, 'If you will just accept these as the really beautiful foundations of our law, then I win.' He's using the real foundational arguments of the legal system to do this. And in a way it's quite conservative: He's saying, 'The basic values are good — and watch how, if you extrapolate them carefully, they will take us: to legal rights for chimpanzees. That's beautiful. It affirms the system, even as it asks the system to go beyond what it presently has done.'"

### **Before the Court**

Beautiful as the argument might be, however, can it succeed? Even among legal scholars who respect Wise's arguments, and acknowledge changing human relationships to animals — widespread condemnations of cruelty, insistence on humanely-treated farm animals, the NIH's historic rejection of most chimp experimentation, a fifteen-fold increase in academic animal law programs over the last two decades — it's difficult to find one who thinks a judge will rule in the chimpanzees' favor.

"I think Wise's work as academic theory, as policy, as discussion, is second to none," said Jonathan Lovvorn, a Georgetown University law professor and senior litigator at the Humane Society of the United States. "His work was transformative within the legal academic field. But I think that translating it at this stage into a legal strategy is just not feasible."

The problem, said Lovvorn, is that chimpanzee personhood, however limited, is still too radical for most judges to consider. Though articulated in bedrock principles of liberty and equality, it's still about *an animal*. It would represent a legal sea change; in the profession's argot, it's "too big an ask," said Lovvorn. It's true that common law has historically been flexible, a vehicle for judicial activism, he said, but that was far more true in the 18th and 19th century than it is now.

Other reservations that will almost certainly cross a judge's mind were raised more than a decade ago [when Wise debated Richard Epstein](#), a legal scholar at New York University, and Richard Posner, a judge on the 7th U.S. Circuit Court of Appeals. "Chimpanzees and bonobos may be the obvious candidates," said Epstein, but that could open the door to personhood claims on behalf of cattle or sheep or rats and mice used in human life-saving medical research. "It's not clear how far exactly you want to run this," he said.

To this, Wise would rejoin that the lawsuit is about the possibility of granting a single right to chimpanzees, and has nothing to do with sheep or rats — but it's no secret that it represents what Wise has often described as his goal of breaking down the legal wall that now separates humans from all other animals. "Once we begin to punch through that wall," said Wise, "all sorts of roads possibly open."

Chimpanzees are now considered exceptional, but similar arguments could presently be made on behalf of other great apes, elephants and some cetaceans, which the Nonhuman Rights Project [had also considered](#). Given that many scientists now [recognize consciousness across the animal kingdom](#), autonomy may eventually prove to be an easily attainable standard for personhood.

One might argue that it's only ethically and scientifically consistent to judge the personhood of each species empirically, as the Nonhuman Rights Project does with chimpanzees, and contemplate rights on a species-by-species basis. From a certain perspective, this is even exciting: if a non-human animals can be persons, then what sort of persons should they be? What rights should they have, or not? Might an entirely new class of rights possession, "animalhood," be established? But excitement is not what most career- and reputation-minded judges seek.

Moreover, as Posner noted, Wise is likely to encounter a deep-seated, almost primal objection that legal rights are simply *human* rights, however arbitrary that may seem. And as Posner wrote in [How Judges Think](#), judges often go with their gut. Of the many factors guiding their decisions, wrote Posner, what the law actually says is often the least important.

In the meantime, says Lovvorn, there's a danger that the Nonhuman Rights Project's efforts will distract from more practical, immediately realistic animal welfare reforms, such as improvements in farm animal treatment or reductions in biomedical experiments on animals. Opponents of such reforms, said Lovvorn, might seize upon chimpanzee personhood as an example of the radical changes that ostensibly modest reformers *really* want. "I can't tell you how many times we hear people say, 'We can't give pigs or laying hens enough room to turn around and stretch their wings, because the end game here is personhood for animals and an end to their commercial use.'"

Brian Hare also struck a practical tone, noting that reforms already underway to protect chimpanzees, such as eliminating a federal loophole that [grants endangered status to wild but not captive chimps](#), could accomplish some of the Nonhuman Rights Project's goals while avoiding thorny questions of personhood. "I think it's great that he's asking the question and challenging the law," said Hare, "but I'm not sure that this particular solution is necessary, or in the best interest of the chimpanzees themselves. I think they are fighting for rights when they should be fighting for welfare and conservation."

William McGrew, however, expressed reservations about the limits of good intentions in the absence of enforceable rights. McGrew said he used to think that, "once humans knew of the apes' qualities, people would extend their concern to their closest living relations." Now, "being older and wiser, I see that was unrealistically idealistic. Just like minors and minorities amongst humans, chimpanzees need legal protection" — and that, McGrew said, should include recognized rights of life, liberty and the pursuit of happiness.

Relying on endangered species protections also raises the question of whether chimpanzees would remain protected if someday they're not endangered. Would they deserve any less consideration then? Rights, argues Wise, are a matter of principle, not something to abandon when they seem inconvenient. Neither are they uncontroversial or unthreatening, at least not when they're first granted. And even if courts rule against chimpanzee personhood —

something that, Wise concedes, is quite possible — at the very least a judge might have the courage and integrity to hold the discussion openly, in light of scientific fact and legal principle.

That discussion could well begin in coming weeks, as judges consider the lawsuits now before them. They might dismiss the cases summarily, without a hearing; or, if one decides to issue the habeas corpus writ, then the chimpanzee's owner will be ordered to appear in court and justify the animal's detention. Wise hopes that, even if judges aren't prepared to accept that a chimpanzee could have a right, they'll be courageous and open-minded enough to listen to the arguments.

If the Nonhuman Rights Project loses, said Wise, they'll appeal the decision; if they lose the appeal, they'll review their arguments and try again, and again after that. Yet there's at least a possibility, however slim, that a judge will rule in their favor, and make possible the lawsuit's concluding request: That Tommy, who can't be released to Africa, can be delivered from solitary confinement in a warehouse cage and taken to a sanctuary, "there to spend the rest of his life living like a chimpanzee, amongst chimpanzee friends, climbing, playing, socializing, feeling the sun, and seeing the sky."



An aerial view of Save the Chimps, a sanctuary in Florida that could house the Nonhuman Rights Project's chimpanzee plaintiffs.



# **The Nonhuman Rights Project: Examining Today's Most Prominent Legal Battle for Animal Rights & The Place of Law in Activism**

By Hope Holtum

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Abstract

This paper serves as an analysis of the Nonhuman Rights Project, its objectives, approaches and driving philosophies. These philosophies will be compared to other popular schools of thought in animal rights and analyzed to determine whether the Nonhuman Rights Project (NHRP) is a sustainable, effective approach in the greater quest for rights for all sentient beings. Does representing a limited variety of species further perpetuate speciesism, or is it a stepping-stone that will gradually open up the civil rights sphere to protect all sentient beings? The organization's choice to begin with the most intellectually complex nonhuman animals is intriguing. Yet, the ultimate goal of the project combined with an awareness of the sluggishness of litigation strategies may prove this approach to be the best way to begin shattering legal barriers. However, when this enforcement of an anthropocentric hierarchy is promoted in social-change-based animal activism, it may end up hindering the social advancement of animal rights. The following examination will attempt to prove that the best approaches for legal change frequently differ from the best ways to invoke cultural shift.

Through both public education and litigation, the Nonhuman Rights Project seeks to change the legal status of some animals from "things" to nonhuman persons who would possess all the fundamental rights granted to humans including bodily integrity and bodily liberty. Founded in 2007 by Steven Wise, the project's webpage claims that they seek "to break through the legal wall that separates humans from nonhumans, thereby gaining legal "personhood" for nonhuman animals, beginning with some of the most cognitively complex animals on earth, including chimpanzees, elephants, dolphins, and whales" (NHRP Website). These species are both sentient and self-aware. While a large number of nonhuman animals are sentient, or able to perceive and feel, only more cognitively complex animals are self aware. The Project is engaged in a long-term strategic litigation campaign that manifests itself in a series of individual cases representing individual cognitively complex animals. It is worth noting that the animals that the Project highlights are certainly not the only animals who are self aware; additionally, intelligence is measured in very anthropocentric terms. This system excludes the unique impressive cognitive capacities of countless other species. In his book *Are We Smart Enough to Know How Smart Animals Are?*, Frans De Waal challenges us to consider intelligence less like a ladder and more "like a bush, with cognition taking different forms that are often incomparable to ours". In short, the Project not only chose animals who are considered intelligent by anthropocentric standards, but also chose members of species with a generally positive connotation attached to them in mainstream society. Some of these cases will later be highlighted.

In order to understand the significance of the unique efforts of the Nonhuman Rights Project in both the legal and animal rights activism spheres, it is first important to understand the basic legal terms the organization uses and how these terms are used for nonhuman animal legal cases. In a short documentary titled *Animals Are Persons Too*, Wise is filmed interacting with his most common clients: chimpanzees, as he explains the concept of legal personhood:



“In legal terms, a ‘person’ is a subject of legal rights and duties” (NHRP site). The law sees entities as either persons or things; to be a legal person is different from being human. In the United States, corporations are granted the status of legal personhood, which allows them to sue and be sued. In New Zealand, a river was recently given the status of a legal person, giving it certain rights and subsequent protection from being polluted. These instances demonstrate that the rights and status of legal personhood applies uniquely to each situation. A river for example would not be given the right to vote as a legal person, but the status still grants rights that apply and benefit it. Similarly, humans, who all possess the status of legal persons in this country are granted rights that are appropriate to them. People with uterus have the right to a safe and legal abortion. These same rights do not explicitly apply to people who do not have uterus simply because there is no need for them to have this right. In the same vein, nonhuman animals who would be granted legal personhood would be granted rights that are relevant to them. In order to obtain legal personhood, it must be proven that the entity has a capacity for at least one legal right. In the case of nonhuman animals, this might be their sentience, which would imply that they “ought” to have a right to bodily liberty and integrity. Once a nonhuman animals’ status is changed from a legal “thing”, which lacks the capacity to hold any rights, to a “person”, the next step is determining exactly what rights they are entitled to. The following writs, formal written orders issued by a court usually to grant extraordinary relief, seek to do this.

“Habeas corpus” requires that anyone who is holding another in some form of detention must show cause as to why they have the right to do this. If the “jailer” cannot show just cause, then the detained must be released. Often the detainee cannot be present to call for a writ of habeas corpus and therefore someone can bring the writ on behalf of another. In the Nonhuman Rights Project’s cases, habeas corpus would be present in cases that would call upon captors of any of the nonhuman animals being represented to justify their reasons for keeping them captive. If the specific animals in question are now viewed as clients of the Project, some legitimacy may be given to fundamental rights such as bodily integrity. However because these cases are individual-based and not species based, the legitimacy given to one animal’s basic rights will not transfer to all members of that species unless the case becomes class action.

Similar to habeas corpus is the writ “de homine replegiando”. This writ “offers legal ‘things’ the opportunity to challenge their legal ‘thinghood’ and establish their right to bodily liberty” (Mills and Wise, 160). Where habeas corpus has been unsuccessful, “de homine replegiando” may succeed. The two differ in that “de homine replegiando is a writ of right, habeas corpus is not. In other words, “de homine replegiando” places the initial burden on the respondent, or captor to “show cause why he or she should not be compelled to comply with the writ and release the prisoner from detention” (166). Some legal experts predict that this writ may be more successful in the case of nonhuman animals. Yet, this writ has not been invoked in about 140 years in the United States, and some fear that the some states may not accept its legitimacy anymore. The central obstacle is that the “writ was abolished in some Southern states because judges were not enthusiastic about black slaves trying to use it to invoke their freedom” (NHRP site).

Finally, common law equality:

“demands that likes be treated alike and unlike be treated unlike. In other words, I am entitled to a right as a matter of equality because I am sufficiently similar, in a legally relevant way, to someone else who possesses that right. And I’m not entitled to that right if I am not sufficiently similar, in a relevant way, to someone who has it.” (NHRP site).

The Nonhuman Rights Project hopes to invoke the part of this principle that determines which qualities are legitimately alike enough that entities should be treated alike. Common law equality rejects any differences that reflect deeply rooted social stereotypes as well as classifications that are morally irrelevant. For instance, currently chimpanzees are barred from bodily integrity not because the right is irrelevant to their existence (their capacity to feel pain makes it relevant), but because they are not human. Under common law equality, this reasoning for denying them rights should be seen as the result of “deeply rooted social barriers”, and therefore as irrelevant. Because of their proximity to humans and their cognitive complexity, Wise and his team believed that some of their first clients, Tommy, Hercules, Leo, and Kiko, were most likely to succeed in changing their status from things to persons.

The first-ever lawsuit was filed on behalf of captive chimpanzees on December 2, 2013. The four chimpanzees all reside in the New York. Tommy is a 26-year-old chimpanzee who lives in a used trailer lot, isolated in a cage inside a dark shed on the owner’s property. Kiko, also 26, was once used in the entertainment industry and is almost completely deaf due to injuries on set, now resides in a cage by himself inside a residential home in Niagara Falls, NY. Hercules and Leo are younger chimpanzees who are owned by the New Iberia Research Center and used for locomotion research at Stony Brook University.

The chimps’ legal representatives demanded they be granted the basic right to bodily integrity via habeas corpus. The suits, filed in the New York Supreme Court, are based on scientific evidence proving that chimpanzees are self-aware and autonomous, and therefore entitled to be recognized as “legal persons” with certain fundamental legal rights. The case summary asserts, “legal claims made by the Nonhuman Rights Project are rooted in genetic, cognitive, physiological, evolutionary and taxonomic evidence that the plaintiffs are self-aware and autonomous”. Rooting their central basis in scientific claims further highlights the relevant aspects of the nonhuman clients and discredits a species barrier as a legitimate division between who is granted personhood and who is not.

The elements of self-awareness and autonomy are unique to cognitively complex species. Nonhuman clients that are closer to humans are more likely to be granted personhood because common law equality will have far less “unalikes” to point out as relevant factors to deny nonhumans personhood. If another species were represented, the basis for their right to legal personhood would be sentience rather than self-awareness. In theory, this too should hold up in court as a legitimate basis for a nonhuman animal’s right to bodily integrity because they can feel physical and often emotional distress; yet the inevitable bias of judges and juries requires the gradualism that NHRP invokes: start with animals closest to humans shattering the barrier, then work from there. The case description for Hercules, Leo, Tommy and Kiko brought significant public attention to NHRP for the first time; in their statements to the public about the case, NHRP asserted that, “Our goal is to breach the legal wall that separates all humans from all nonhuman animals.”



The Nonhuman Rights Project's messages of "liberty, equality, and justice" were initially not taken seriously. As the arguments put forth by the project became known to the public, some groups felt that their own movements were threatened by NHRP's rhetoric. The Discovery Institute's Center on Human Exceptionalism condemns NHRP; Wesley Smith, the Institute's leader, accuses them of comparing chimpanzees to black people. An anti-abortion group has also attacked the organization, saying that they assert autonomy and self-determination as requirements for basic rights, rather than sufficient conditions. Both of these groups mistake the legal rhetoric the organization puts forth for social or philosophical rhetoric. NHRP draws legal analogies on how habeas corpus can be used for nonhuman animals in the same way slaves used it to obtain their freedom. It is comparisons such as this that have served as mechanisms of division between movements. Marjorie Spiegel's book *The Dreaded Comparison* interrogates the practice of slavery by comparing the enslavement of animals to the enslavement of African Americans. Needless to say, the comparison was met with controversy and a slew of mixed feelings by civil rights activists, along with animal rights activists who sought to maintain separation between their movement and that of racial justice. While legal rhetoric is often misinterpreted as exclusive of prejudice when it appears in a social sphere, racism in the animal rights movement is certainly a legitimate claim regardless of whether NHRP as an organization perpetuates it. There are surely loud voices in the animal rights movement who are unengaged in human rights discourse or even trivialize it. These voices remind us of the separation between movements that have the potential to intersect and consequently become stronger. Moreover, it is also the central reason that legal endeavors to protect and empower marginalized groups often look very different from social endeavors. For the purposes of this paper, the "social sphere" refers to any sector, rhetoric or situation that illustrates social norms and beliefs. The central discrepancy between NHRP's legal efforts to obtain animal rights and the modern animal rights movement is the presence of a species hierarchy in NHRP's strategies, which directly contradicts routine rejections of anthropocentrism in the philosophical realm.

In addition to the reinforcement of speciesism within and outside of the animal rights movement, NHRP's decision also appears to perpetuate ableist ideas, discrimination against those with physical and cognitive abilities that are different from the hegemonic majority, regarding who is eligible to receive certain rights and who is not. This proves problematic for both animal and human rights activists because it inadvertently implies that one should have certain rights not because they are fundamentally entitled to them, but because they are capable of a specific function (e.g. self awareness). In her 2009 work *The Personal is Philosophical is Political*, Eva Kittay's ethical analysis brings to light that one can also reasonably foresee obstacles that this rhetoric will pose in affirming differently abled humans' eligibility to the same rights as their able-bodied human counterparts.

The discrepancy described above can also be illustrated in different terms. In Todd Gitlin's *Letters to a Young Activist*, he describes two distinct groups that take very different, but equally necessary approaches to social change:

"Successful protest movements require two types of activists working in tandem. There are outsiders, usually young, moralistic, committed to confronting the powers that be with evidence of errors, sins, and crimes. [...] Insiders, by contrast are usually professionals, academics, and lawyers. They are older, more accomplished, lovers of order who tend not to raise their voices. They are familiar with the ways of bureaucracy." (Gitlin, 94).

“Inside activists” are essential because they are practical and can incite the concrete change that often eludes “outside activists”, who are more focused on ideologies. By the same token, outside activists help a movement maintain a clear vision of the future without having to compromise their ideals in the face of bureaucracy. Needless to say, the Nonhuman Rights Project is operating under countless litigation frameworks that impede the rate of progress severely. NHRP is equipped with the education and an understanding of how these frameworks function and can suppose approaches most likely to be successful. The necessity of these two approaches is further confirmed when past social justice movements are examined.

Activists also often craft their strategies of outreach by leaning toward either methods of incremental change (eat less meat, become vegetarian first, then vegan) or by encouraging a more immediate drastic change with the ultimate intent of immediate abolitionism for animals. Activist Christoph Swatosch reminds us that both approaches share the common goal of abolishing all use of animals by humans. They differ in what they think the most effective method is to achieve this. Like most dichotomies, when played out in the real world, they appear more as a spectrum rather than a binary. The Nonhuman Rights project embodies an appropriately complicated combination of the two approaches as well, clearly leaning more toward instrumentalism. While they believe that ultimately all animals should be granted personhood, they begin with those our society deems closest to humans.

In Tammie Bryant’s article on *Similarity or Difference as a Basis for Justice*, she remains critical of the similarity arguments that many animal advocates pose when trying to obtain rights for nonhuman animals. As mentioned above regarding common law equality, “The similarity argument, in the context of advocacy for animals, claims that animals are like humans in the capacities that are relevant to legal entitlements” (211). She fears that it the requirement of likes being treated alike “creates a hierarchy of worthiness” (Bryant, 215). In the current efforts of the Nonhuman Rights Project, the attempt to draw similarity is on the basis of cognitive ability. Multiple animal rights philosophers have pointed out the anthropocentric attitude that comes with distributing value to a species based on their cognitive abilities. In *The Feminist Care Tradition in Animal Ethics*, Josephine Donovan suggests that proximity to humans should not be a component in gauging the value of a being. She posits an alternative feminism-inspired justification for rights and respect for all species that is rooted in interconnectedness and “recognizes the varieties and differences among the species but does not quantify or rank them hierarchically in a Great Chain of Being and... understands that they and we exist in the same unified field continuum” (Donovan, 74). Though Bryant echoes Donovan’s testaments about the hypocrisy and toxicity of the similarity approach, she then concedes the necessity of this approach within the current framework: “The history of social justice activism in the United States suggests that use of the similarity argument during the initial stages of reform may be inevitable” (Bryant 226). By looking to past movements that have fought for the rights of marginalized groups, it is clear that it is not uncommon for underlying ideologies to become warped, hidden or substituted with more legally palatable rhetoric in order to gain traction. She admits this by claiming, “Civil rights activists, feminists, gay rights activists, and the disability rights community have all used the argument that a just society would provide entitlements to the groups they represent (and the individuals within them) because of those groups’ similarity to

the legally protected groups” (226). Bryant is honest about her awareness of both the necessity and the danger of invoking compromised ideals into bureaucratic structures.

Under common law equality, invoking a similarity argument as a starting point for courts to acknowledge the legal personhood of nonhuman animals proves to be especially necessary since the term itself requires that “likes be treated alike”. Applying a more ideal anti-discriminatory approach rather than a similarity approach would require changing a cornerstone element of the current legal system: certainly a worthy long-term aspiration. But long-term goals must not hinder more practical short-term goals, even if they are less “ideologically pure”. It is necessary to never lose sight of the underlying ideologies that may not yet be apparent in the legal sphere; that would be where “outside activists” come in, maintaining a pure vision throughout the logistical battles.

It is the endurance of these ideologies that come in, once a movement gains traction. Bryant calls the quest for rights that does not require sameness, the anti-discrimination approach. She goes on to specify: “The anti-discrimination approach [...] is based on the idea that a just society would prevent harm or exclusion that is based on superficial or irrelevant differences among people. Such a society would protect and amplify diversity and inclusion” (210). She cites the feminist movement as a pertinent example of a movement’s shift from the similarity approach to anti-discrimination. She recalls, “In the 1960s and 70s, it was important to women’s advocates to emphasize similarities between women and men so that women could gain more equitable access to the workforce and the workplace” (229). Once women finally began to become assimilated in the workforce, it became apparent that when women wanted to become pregnant but keep their job afterward, there were no accommodations because they were expected to perform their duties in the exact same way men have. Feminists then began advocating with a different goal, one that would involve “restructuring the workplace so that people of varying capacities at any given time in their careers could work in an environment that fully anticipated such variations” (231). This time instead of denying differences between men and women, feminists acknowledged them, claiming that true equality required a structure that accommodated all who were entitled to participate in it. The concept of true equality is often viewed next to “formal equality”, which is simply the passing of a law that grants protections and acknowledgements of one’s rights. Bryant argues that equality does not stop here; it is only the beginning. After formal equality, or a minimal acknowledgement of a group’s rights, there must be a demand to restructure the systems that the group is now allowed to be a part of so that they can also participate in it and have an equal opportunity to succeed.

The Nonhuman Rights Project represents the beginning of a movement: the foundation of formal equality. Their place in animal rights represents the start of something grander. Just as the integration of women in the workforce was one of the first steps toward gender equality, so too for animals is the acknowledgement of some species’ legal personhood. But, pursuit of justice cannot stop after the Nonhuman Rights Project succeeds. Their goal is to create traction, and the inside and outside activists that follow must build on that traction to create something more dynamic. Hopefully, once our society can begin to imagine civil rights including animal rights, the movement can shift toward the anti-discrimination approach, just as feminists did with their movement. What does an anti-discriminatory approach look like for animals? The basis for a being having legal personhood may not be their cognitive proximity to humans, but their existence as diverse, distinct species which are part of a web

of interdependent life; that alone is a sufficient reason to protect them from human exploitation. Our culture is far away from this goal, but the vision must stay alive as groups like the Nonhuman Rights Project drudge through logistical obstacles. In the meantime, outside activists can fight on, relentlessly deconstructing harmful social norms that oppress all animals, an oppression that, as long as they are in existence, will inevitably circle back to our own species.